TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~339.~~ ~~139~~ 20

WILLIAM H. BARNES AND JAMES N. KERNS, PLAINTIFFS IN ERROR,

VS.

THE PHILADELPHIA AND TRENTON RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF PENNSYLVANIA.

FILED DECEMBER 6, 1870.

SUPREME COURT OF THE UNITED STATES.

No. 339.

WILLIAM H. BARNES AND JAMES N. KERNS, PLAINTIFFS IN ERROR,

VS.

THE PHILADELPHIA AND TRENTON RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

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1 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

Pleas before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit. Of April sessions, 1870, No. 28.

Inter alia it is thus contained:

Be it remembered that, on the ninth day of May, in the year of our Lord one thousand eight hundred and seventy, John K. Valentine, esquire, assistant district attorney of the United States for the eastern district of Pennsylvania, comes into court here and presents the petition of William H. Barnes and James N. Kerns for the removal of the cause from the supreme court of Pennsylvania for the eastern district; which said petition, being filed, is in the words and of the tenor following, to wit:

To the honorable the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit:

2 Your petitioners, William H. Barnes and James N. Kerns, respectfully represent that suit has been brought against them by The Philadelphia and Trenton Railroad Company in the supreme court of Pennsylvania in and for the eastern district of Pennsylvania, of of July term, 1870, No. 67, by summons, trespass vi et armis.

That your petitioners are officers of the United States, appointed under and acting by authority of the act of Congress, entitled "An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes," passed June 30th, 1864, and acts in addition thereto and in amendment thereof, to wit, the said William H. Barnes, collector of internal revenue for the first district, for assessing and collecting taxes in the State of Pennsylvania, and the said James N. Kerns, deputy collector for the said first district. That the said suit has been brought against your said petitioners on account of an act done by them under color of their said offices as said collector and deputy collector, to wit, on account of a distraint made by them, the said William H. Barnes and James N. Kerns, in their said
3 official capacities, for the purpose of collecting a tax claimed by the United States from the said plaintiffs and duly assessed against them.

Your petitioners therefore pray that the cause may be entered on the docket of your honorable court and proceeded in as in a cause originally commenced therein, and that a writ of "certiorari" be immediately issued by the clerk of your honorable court to the prothonotary of the supreme court of the State of Pennsylvania aforesaid, requiring the said supreme court to send to the said circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, the record and proceedings on the said cause, according to the provisions of the act of Congress in such case made and provided. And they will ever pray, &c.

JAMES N. KERNS.

William H. Barnes, one of the above-named petitioners, being duly sworn according to law, says that the facts set forth in the above petition are true, to the best of his knowledge and belief.

4 Sworn and subscribed before me this day of May, A. D. 1870.

James N. Kerns, one of the above-named petitioners, being duly sworn according to law, says that the facts set forth in the above petition are true, to the best of his knowledge and belief.

JAMES N. KERNS.

Sworn & subscribed before me this 9th day of May, A. D. 1870.

W. GRIER HIBLER,
U. S. Commissioner.

I hereby certify that, as counsel for said petitioners, William H. Barnes and James N. Kerns, I have examined the proceedings against them and carefully inquired into all the matters set forth in the foregoing petition, and that I believe the same to be true.

AUBREY H. SMITH,
U. S. Attorney.

5 Which said petition having been filed, it was ordered by the court here that a writ of certiorari do immediately issue, directed to the supreme court of Pennsylvania for the eastern district; which said writ is in the words following, to wit:

The President of the United States to the honorable the judges of the supreme court of Pennsylvania for the eastern district, greeting:

Whereas lately in your said supreme court of Pennsylvania for the eastern district, suit was brought against William H. Barnes and James N. Kerns, by The Philadelphia and Trenton Railroad Company, in a plea of trespass vi et armis, (of July term, 1870, No. 67,) which said plea, as it is said, is still pending before you in the said supreme court of Pennsylvania, undetermined; and whereas on the application of the said William H. Barnes and James N. Kerns to the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, on a suggestion, supported by proper evidence,
6 that the said suit was brought on account of acts done by them under and acting by authority of the act of Congress, entitled "An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes," passed June 30th, 1864, and acts in addition thereto and in amendment thereof, to wit, the said William H. Barnes, collector of internal revenue for the first district, for assessing and collecting taxes in the State of Pennsylvania, and the said James N. Kerns, deputy collector of the said first district, to wit, on account of a distraint made by them, the said William H. Barnes and James N. Kerns, in their said official capacities, for the purpose of collecting a tax claimed by the United States from the said The Philadelphia and Trenton Railroad Company and duly assessed against them.

They therefore respectfully pray that a writ of certiorari may be immediately issued by the clerk of the said circuit court of the United States to the said supreme court of Pennsylvania, requiring them to send to the said circuit court of the United States the record and
7 proceedings in *in* the said cause, according to the provisions of the act of Congress in such case made and provided.

Wherefore, you are hereby required to transmit, under your seal, the record and proceedings of the said suit, with all things thereunto relating, unto the said circuit court of the United States, to be holden at Philadelphia, for the eastern district of Pennsylvania, plainly and distinctly, in as full and ample manner as it now remains before you, together with this writ, so that the said circuit court of the United States may be able therein to proceed and to do what shall appear of right ought to be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Philadelphia, this ninth day of May, A. D. 1870, and in the 94th year of the independence of the United States.

[SEAL.] SAMUEL BELL,
Clerk C. C. U. S.

8 And afterwards, to wit, on the seventeenth day of May, A. D. 1870, the said writ of certiorari was returned into the said circuit court of the United States with the record and proceedings of the said supreme court of Pennsylvania; which said return and record being read, are as follows, to wit:

In the supreme court in and for the eastern district of Pennsylvania.
July term, 1870.

THE PHILADELPHIA AND TRENTON RAILROAD Company
vs.
WILLIAM H. BARNES AND JAMES N. KERNS.
No. 67.

Issue summons, in trespass vi et armis, returnable the first Monday of June next.

May 5th, 1870.

A. I. FISH,
Plaintiff's Att'y.

To J. ROSS SNOWDEN,
Proth'y of Supreme Court.

9 (Endorsement:) No. 67. July term, 1870. The Philadelphia and Trenton Railroad Company vs. William H. Barnes and James N. Kerns. Precipe. Filed May 5th, 1870.

10 EASTERN DISTRICT OF PENNSYLVANIA,
City and County of Philadelphia, ss:

[SEAL.] The Commonwealth of Pennsylvania to the sheriff of Philadelphia County, greeting:

We command you that you summon William H. Barnes and James N. Kerns, late of your county, so that they be and appear before the justices of our supreme court at our same court, to be holden at Philadelphia, in and for the eastern district of the State of Pennsylvania, on the first Monday of June next, to answer The Philadelphia and Trenton Railroad Company of a plea trespass vi et armis, and have you then and there this writ.

Witness the Hon. James Thompson, doctor of laws, chief justice of our said supreme court, at Philadelphia, the fifth day of May, in the year of our Lord one thousand eight hundred and seventy.

JAMES ROSS SNOWDEN,
Prothonotary.

11 (Indorsed:) No. 67. July term, 1870. Supreme court. The Philadelphia and Trenton Railroad Company vs. William H. Barnes and James N. Kerns. Summons. Returnable the first Monday of June, 1870. A. I. Fish.

Served by giving a true and attested copy of the within writ to William H. Barnes, one of the within-named defendants, and making known to him the contents thereof May 6th, 1870; also by leaving a like copy at the dwelling-house of James N. Kerns, the other defendant, with an adult member of his family May 7th, 1870. So answers—

JEREMIAH W. FRITZ,
Dep. Sh'ff,
PETER LYLE, *Sheriff.*

12 *Docket entries.—Appearance docket.—July term,* 1870, *No.* 67.

A. I. Fish.

THE PHILADELPHIA AND TRENTON RAILROAD Company
vs.
WILLIAM H. BARNES AND JAMES N. KERNS.

Summons, trespass vi et armis, ret'ble the first Monday of June, 1870. Exit May 5, 1870. Served.

I certify the above and foregoing to be a true copy of the whole record, docket entries, and proceedings in the above case.

In witness whereof I have hereunto set my hand and affixed the seal of the said supreme court, at Philadelphia, this twelfth day of May, A. D. 1870.

[SEAL.] JAMES ROSS SNOWDEN,
Prothonotary.

A certified copy of the record and proceedings in the case herein mentioned is herewith transmitted to the circuit court of the United States as is herein required.

Attest: JAMES ROSS SNOWDEN,
Prothonotary.

13 And afterwards, to wit, on the twenty-third day of May, in the year last aforesaid, the said plaintiffs, "The Philadelphia and Trenton Railroad Company," by Asa I. Fish, esquire, their attorney, come into court here and file their declaration; which being read, is as follows, to wit:

Declaration.

COUNTY OF PHILADELPHIA, *ss:*

William H. Barnes and James N. Kerns, defendants, were attached to answer The Philadelphia and Trenton Railroad Company, plaintiffs, of a plea of trespass, and thereupon the said plaintiffs, by A. I. Fish, their attorney, complain against the said defendants,—for that the said defendants, on the 4th day of May, 1870, with force and arms, &c., seized, took, and distrained certain goods and chattels, to wit, the desks, chairs, tables, and other personal property of the said plaintiffs, being at and in their building, situate at No. 224 South Delaware avenue, in the city of Philadelphia, of great value, to wit, of the value of three thousand dollars, to wit, at the county of Philadelphia aforesaid, and then and there kept and detained the same, so seized and distrained, for a long space of time, to wit, for the space of one day then next following, whereby the said plaintiffs, for and during all that time, lost, and were deprived of, the use of the said goods and chattels, and the same were greatly damaged, lessened in value and spoiled, to wit, at the county aforesaid; and other wrongs to the said plaintiffs then and there did, to the great damage of the said plaintiffs and against the peace of the Commonwealth of Pennsylvania; wherefore the said plaintiffs say that they are injured, and have sustained damage to the amount of five thousand dollars, and therefore they bring their suit, &c.

A. I. FISH,
Plaintiffs' Attorney.

MAY 23D, 1870.

14 And afterwards, to wit, on the first day of June, A. D. 1870, in the year last aforesaid, the said defendants, William H. Barnes and James N. Kerns, by Aubrey H. Smith, esquire, their attorney, come into court here and file their pleas; which said pleas are as follows, to wit:

Pleas.

First plea. And the said defendants, by Aubrey H. Smith, their attorney, come and defend the force and injury when, &c., and say that they are not, nor is any or either of them, guilty of the said supposed trespasses above laid to their charge, or any or either of them, or any part thereof, in manner and form as the said plaintiffs have above complained against them; and of this the said defendants put themselves upon the country, &c.

Second plea. And for a further plea in this behalf, the said defendants, by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, say that the said plaintiffs ought not to have or maintain their aforesaid action thereof against them, because they say that the said plaintiffs are a railroad company, duly incorporated under and in pursuance of the laws of Pennsylvania; and as such did, on the 19th day of January, 1870, declare a semi-annual dividend of five per centum in money on the capital stock of the said company, amounting to the sum of $66,268 42, as part of their net earnings, profits, income and gains made and accrued between the 1st day of July, 1869, and the 31st day of December, 1869; which dividend was declared as payable to the stockholders of the said company on and after the 1st day of February, 1870.

And the said defendants further say that after the said plaintiffs had thus provided for the aforesaid dividend, there remained a surplus of the said profits, income, and gains, amounting to the sum of $80,708 43, which was set apart for certain necessary constructions and repairs.

And the said defendants further say that the said plaintiffs afterwards, and a long time before the said time, when, &c., made due return to the assessor of the internal revenue of the United States for the first collection district of Pennsylvania, of the dividend so made, and of the surplus so remaining as aforesaid, whereupon a tax of five per centum upon the amount of the said dividend and of the said surplus, to wit, the sum of $7,348 84, was duly assessed by the said assessor upon the said plaintiffs; which said tax became due and payable to the United States on or before the last day of March, 1870.

14½ And the said defendants further say that the said William H. Barnes, long before, and at the time when, &c., was the collector of the internal revenue of the United States for the first collection district of Pennsylvania; and the said James N. Kerns at the same time was deputy collector thereof for the same district.

And that the said William H. Barnes, being the collector of the internal revenue of the United States for the said district as aforesaid, did duly notify the said plaintiffs that the said tax so assessed against them was due and payable on or before the said last day of March, 1870, as aforesaid; and that unless the same should be paid on or before that day, it would become his duty to collect the same, together with a penalty of five per centum additional thereto, and interest at the rate of one per centum per month from the time when the said tax was due and payable.

And the said defendants further say that the said tax was not paid by the said plaintiffs to the said William H. Barnes, collector as aforesaid, on or before the said last day of March, 1870; whereupon afterwards, and long time before the time when, &c., to wit, on the 21st day of April, 1870, he, the said William H. Barnes, collector as aforesaid, did, in due form, demand payment thereof by the said plaintiffs, together with five per centum additional thereto, and such interest as might accrue before payment; and did further notify the said plaintiffs that if the said tax, penalty, and interest should not be paid within ten days from the making of the said demand, he would make distraint therefor, as provided by law.

And the said defendants further say that, notwithstanding the said notice and demand, the said tax, together with the five per centum additional thereto, and the interest accrued thereupon as aforesaid, was, on the aforesaid 4th day of May, 1870, and at the said time when, &c., yet wholly due and unpaid by the said plaintiffs; wherefore the said William H. Barnes, collector as aforesaid, and the said James N. Kerns, deputy collector as aforesaid, by his command on the said day when, &c., did enter into and upon the said building of the said plaintiffs, situate at No. 224 South Delaware avenue, in the city of Philadelphia, in which, &c., and did then and there seize, take, and distrain
15 the said goods and chattels in the said declaration mentioned, as and for a distress for the said tax, and together with the five per centum additional thereto, and the interest accrued thereupon as aforesaid, and took and seized the same thereon as such distress as aforesaid, on the most fit and convenient part thereof for that purpose, according to the form of the statute in such case made and provided, which are the same supposed trespasses in the introductory part of this plea mentioned.

And this the said defendants are ready to verify, &c. Wherefore they pray judgment if the said plaintiffs ought to have and maintain their aforesaid action thereof against them, &c.

(Signed) AUBREY H. SMITH,
For Defendants.

And afterwards, to wit, on the same day, the plaintiffs aforesaid, by their attorney aforesaid, come into court here and file their replication and demurrer; which being read is as follows:

Replication and demurrer.

And the said plaintiffs, as to the plea of the said defendants first above pleaded, and whereof they have put themselves upon the country, do the like.

And the said plaintiffs, as to the plea of the said defendants secondly above pleaded, say that the same, and the matters therein contained, in manner and form as the same are pleaded, are not sufficient in law to bar the plaintiffs from having or maintaining their aforesaid action thereof against the said defendants, and that they are not bound by law to answer the same. And this they are ready to verify. Wherefore, for want of a sufficient plea in this behalf, the plaintiffs pray judgment, &c.

And thereupon, upon the same day, the defendants aforesaid, by their attorney aforesaid, join in the demurrer; and the said joinder being read and filed is as follows:

16 *Joinder in demurrer.*

And the said defendants say that the said plea, and the matters therein contained, in manner and form as the same are pleaded, are sufficient in law to bar the plaintiffs from having or maintaining their aforesaid action against the said defendants, and this the said defendants are ready to verify. Wherefore, as the said plaintiff hath not answered the said plea, nor hitherto in any manner denied the same, the said defendants pray judgment, &c.

(Signed) AUBREY H. SMITH,
For Defendants.

And afterwards, to wit, on the first day of July, in the year last aforesaid, the defendants aforesaid, by Aubrey H. Smith, esquire, their attorney, leave of the court being first had and obtained, withdraw their said plea of not guilty.

And afterwards, to wit, on the nineteenth day of September, in the year last aforesaid, come the parties aforesaid, by their attorneys aforesaid, upon which, the record and matters aforesaid having been seen and by the court now here fully understood, and all and singular the premises having been examined, and mature deliberation being had thereupon, for that it seems to the court that the demurrer aforesaid is not sufficient in law, and that the plaintiffs
17 aforesaid ought to have and maintain their said action against the said defendants, as the said plaintiffs have above alleged, by reason whereof, the said plaintiffs ought to recover from the said defendants their damages by occasion of the premises; but because it is unknown to our said court here what damages the said plaintiffs have sustained in the premises as for their costs and charges by them about their suit in this behalf expended, the marshal is commanded that, by the oaths and affirmations of twelve honest and lawful men of his district, he diligently inquire what damages the aforesaid plaintiffs have sustained, as well by the occasion of the premises aforesaid, as for their costs and charges by them about their said suit in this behalf expended.

Whereupon, afterwards, to wit, on the seventeenth day of October, in the year last aforesaid, because it is unknown what damages the said plaintiffs have sustained, they, by their attorney aforesaid, sue forth out of our said court here, a writ of inquiry of damages; which said
18 writ being issued, is in the words following, to wit:

UNITED STATES,
Eastern District of Pennsylvania, sct:

The President of the United States to the marshal of the eastern district of Pennsylvania, greeting:

Whereas William H. Barnes and James N. Kerns, defendants, were attached to answer The Philadelphia and Trenton Railroad Company, plaintiffs, of a plea of trespass. And thereupon the said plaintiffs, by A. I. Fish, their attorney, complain against the said defendants, for that the said defendants, on the fourth day of May, 1870, with force and arms, &c., seized, took, and distrained certain goods and chattels, to wit, the desks, chairs, tables, and other personal property of the said plaintiffs, being at and in their building, situate at No. 224 South Delaware avenue, in the city of Philadelphia, of great value, to wit, of the value of three thousand dollars, to wit, at the county of Philadelphia aforesaid; and then and there kept and detained the same so seized and 19 distrained, for a long space of time, to wit, for the space of one day then next following, whereby the said plaintiffs, for and during all that time, lost, and were deprived of, the use of the said goods and chattels, and the same were greatly damaged, lessened in value, and spoiled, to wit, at the county aforesaid. And other wrongs to the said plaintiffs, then and there did to the great damage of the said plaintiffs, and against the peace of the Commonwealth of Pennsylvania. Wherefore the said plaintiffs say that they are injured and have sustained damage to the amount of five thousand dollars. And therefore they bring their suit, &c.

And it was in such manner proceeded in our said court, that the said plaintiffs ought to recover their damages against the said defendants which they sustained by reason of the premises; but because it is unknown what damages the said plaintiffs have sustained by the occasion thereof, we command you, that by the oaths or solemn affirmations of twelve honest and lawful men of your district, you diligently inquire what damages the said plaintiffs have sustained, as well by occa- 20 sion of the premises as for their costs and charges by them about their suit in that behalf expended. And the inquisition that you shall take thereof, make manifest before our judges at Philadelphia, at a circuit court of the United States for the eastern district of Pennsylvania, in the 3d circuit, at Philadelphia, there to be held the first Monday of November next, under your seal and the seal of those by whose oaths or affirmations respectively you shall make that inquisition. And have you then there the names of those by whom you shall make that inquisition, and this writ.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Philadelphia, this seventeenth day of October, A. D. one thousand eight hundred and seventy.

[SEAL.] SAMUEL BELL,
Clerk Circuit C't U. S.

21 And afterwards, to wit, on the seventh day of November, in the year of our Lord last aforesaid, comes into court here the parties aforesaid, by their attorneys aforesaid, and Edgar M. Gregory, the marshal for the said eastern district of Pennsylvania, by virtue of the writ to him directed, returned here a certain inquisition; which being read is as follows, to wit:

EASTERN DISTRICT OF PENNSYLVANIA,
City and County of Philadelphia, ss :

An inquisition indented and taken at the city of Philadelphia, in
county aforesaid, this nineteenth day of October in the year of our
Lord one thousand eight hundred and seventy, before Edgar M. Gregory,
esq., marshal in and for the eastern district of Pennsylvania
aforesaid, by the oaths and affirmations of the jurors whose names
and seals are hereunto annexed, good and lawful men of my district who
say upon their oaths and affirmations, that "The Philadelphia and Trenton
Railroad Company," plaintiffs in the writ to this inquisition annexed
named, have sustained damages by means of the premises in
22 the said writ mentioned, against William H. Barnes, one of the
defendants, and against James N. Kerns, the other of the defendants,
to the amount of fifty dollars, lawful money, as aforesaid, and
eighty-seven dollars and fifty-seven cents costs.

In testimony whereof, as well I, the said marshal, as the jurors aforesaid, to this inquisition, have affixed our hands and seals the day and year above mentioned.

E. M. GREGORY, [SEAL.]
U. S. Marshal.

HENRY DAVIS.	[SEAL.]	JOHN C. GERRISH.	[SEAL.]
J. A. GREGORY.	[SEAL.]	JAMES CREMER.	[SEAL.]
AMOS BATEMAN.	[SEAL.]	JOHN MANDERSON.	[SEAL.]
MAHLON H. DICKINSON.	[SEAL.]	M. T. WILLIS.	[SEAL.]
HENRY H. REED.	[SEAL.]	H. G. CLARK.	[SEAL.]
B. C. WORTHINGTON.	[SEAL.]	J. T. BAILEY.	[SEAL.]

(Endorsement:)
The execution of the within writ will appear by reference to a certain schedule or inquisition thereto annexed. So answers—

E. M. GREGORY, *Marshal,*
Per SAM'L J. WRIGHT, *Deputy.*

23 And thereupon, forasmuch as the court now here is not as yet advised about giving judgment of and upon the premises, day is therefore given to the said parties to be before the court in four days, to wit, on the eleventh day of November, in the year aforesaid, for hearing judgment of and upon the premises, because the said court here is not yet advised thereupon. At which said day, to wit, the eleventh day of November, before our said court come the said The Philadelphia and Trenton Railroad Company, by their attorney aforesaid, whereupon the premises being seen and fully understood by the court here, and mature deliberation being had thereon, it is considered that the said The Philadelphia and Trenton Railroad Company do recover from the said William H. Barnes and James N. Kerns, their damages aforesaid by the said inquisition in form aforesaid found, and also eighty-seven dollars and fifty-seven cents, adjudged to the said The Philadelphia and Trenton Railroad Company, by the court now here, at their request, for increase of their said costs and charges, which said damages in the
whole amount to the sum of one hundred and thirty-seven dollars
24 and fifty-seven cents. And the said defendants in mercy, &c.

And, afterwards, to wit, on the fifteenth day of November, A. D. 1870, come the said defendants, by Aubrey H. Smith, esquire, their attorney, and file their assignments of error; which being read are as follows, to wit:

Afterwards, to wit, on the first Monday of December, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, come the said plaintiffs in error, by Aubrey H. Smith, their attorney, and say that, in the record and proceedings aforesaid, there is manifest error, in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said defendants in error against the said plaintiffs in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs in error against the said defendants in error; and the said plaintiffs in error pray that the judgment aforesaid may be reversed, annulled, and altogether held for
25 nothing, and that they may be restored to all things which they have lost by occasion of the said judgment, &c.

AUBREY H. SMITH,
Att'y for Pl'ffs in Error.

UNITED STATES OF AMERICA, *ss:*

To the Philadelphia and Trenton Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, wherein William H. Barnes and James N. Kerns are plaintiffs, and you, the said The Philadelphia and Trenton Railroad Company are defendants in error, to show cause, if any there may be, why judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this twenty-fourth day of November, A. D. 1870.

W. STRONG,
One of the Justices of the Supreme Court U. S.

Service of the above citation accepted.

A. I. FISH,
W'M HENRY RAWLE,
Att'ys for Phila. & Trent. R. R. Co.

Nov. 25, 1870.

26 UNITED STATES,
Eastern District of Pennsylvania, sct:

[SEAL.] The President of the United States to the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, greeting:

Because that in the record and process, and also in the rendering of judgment in a suit before you, between The Philadelphia and Trenton Railroad Company, plaintiffs, and William H. Barnes and James N. Kerns, defendants, in a plea of trespass vi et armis, a manifest error has entervened to the great damage of the said defendants, as in their complaint has been stated; and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf:

You are hereby commanded that if judgment thereof be given, then under your seal you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them and this writ, so that you have the same before the justices of the Supreme Court of the United States, at a court to be holden at Washington, on the first Monday of December next, that the record and process aforesaid being inspected, they may cause to be done thereupon, what of right ought to be done.

Witness the Honourable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Philadelphia, this fifteenth day of November, A. D. one thousand eight hundred and seventy, and in ninety-fifth year of the independence of the said United States.

W. GRIER HIBLER,
Pro. Clerk C. C. U. S., E. D. Pa.

Allowed by—

W. STRONG,
One of the Justices of the Supreme Court U. S.

27 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct:

I, Samuel Bell, clerk, do hereby certify the foregoing to be a true and faithful copy of the record and proceedings of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, in a certain suit therein lately depending between The Philadelphia and Trenton Railroad Company, plaintiffs, and William H. Barnes and James N. Kerns, defendants.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said circuit court, at Philadelphia, this twenty-ninth day of November, A. D. 1870, and in the ninety-fifth year of the independence of the said United States.

[SEAL.]
SAMUEL BELL,
Clerk C. C. U. S., E. D. of Pa.

(Indorsement on cover:) No. 339. William H. Barnes and James N. Kerns, plaintiffs in error, vs. The Philadelphia and Trenton Railroad Company. E. Pennsylvania C. C. U. S. Filed 6th December, 1870.

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

WILLIAM H. BARNES, JAMES N. KERNS, and ALBERT L. MAGILTON, *Plaintiffs in Error*, *vs.* THE PHILADELPHIA AND READING R. R. CO.	No. 134.

In error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

BRIEF FOR THE PLAINTIFFS IN ERROR.

In the Supreme Court of the United States.

December Term, 1871.

William H. Barnes, James N. Kerns, and Albert L. Magilton, *Plaintiffs in Error*,
vs.
The Philadelphia and Reading R. R. Co.
No. 134.

Same
vs.
The Lehigh Valley R. R. Co.
No. 135.

Same
vs.
The Lake Superior and Mississippi R. R. Co.
No. 136.

Same
vs.
The Philadelphia and Reading R. R. Co.
No. 137.

William H. Barnes and Jas. N. Kerns, *Plaintiffs in Error*,
vs.
The Harrisburg, Portsmouth, Mount Joy, and Lancaster R. R. Co.
No. 138.

Same
vs.
The Philadelphia and Trenton R. R. Co.
No. 139.

In error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

BRIEF FOR PLAINTIFFS IN ERROR.

These were actions of trespass brought by the defendants in error, respectively, against the plaintiffs in error, then serving as collector and deputy collectors of internal revenue, for divers alleged seizures by the latter, in the city of Philadelphia, on the 4th and 5th of May, 1870, of certain goods and chattels belonging to the former. The suits were all commenced in the supreme court of Pennsylvania for the eastern district on the 5th of May, 1870, but were afterwards removed to the circuit court of the United States for the eastern district of Pennsylvania, where final judgment was rendered in each on the 11th of November, 1870.

The questions presented for the decision of this court arise on demurrer to the second plea in each of the several cases, that in the first case (No. 134) being as follows:

"And for a further plea in this behalf, the said defendants, by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, say that the said plaintiffs ought not to have or maintain their aforesaid action thereof against them, because they say that the said plaintiffs are a railroad company duly incorporated under and in pursuance of the laws of Pennsylvania; and that by the law incorporating the said company it was provided that dividends of so much of the profits thereof as should appear advisable to the managers should be declared at least twice a year in every year, and should be paid to the stockholders at any time after the expiration of ten days therefrom; and the said company did, on the 22d day of December, 1869, declare a dividend in money amounting to the sum of one million five hundred and twenty-seven thousand five hundred and thirty-one dollars and fifty-nine cents ($1,527,531 59) on their capital stock, as part of their earnings, profits, incomes, and gains made and accrued between the 1st day of July, 1869, and the 1st day of December, 1869; which dividend was declared as payable to the stockholders of the said company on and after the 17th day of January, 1870.

"And the defendants further say, that a return thereof was afterwards, and a long time before the said time when, &c., duly made by the said plaintiffs to the assessor of the internal revenue of the United States for the first collection district of Pennsylvania, and a tax of five per centum upon the amount of the said dividend, to wit, the sum of seventy-six thousand three hundred and seventy-six dollars and fifty-eight cents, ($76,376 58.) was assessed by him upon the said plaintiffs: which said tax was due and payable by the plaintiffs to the United States on or before the last day of March, 1870.

"And the said defendants further say, that the said William H. Barnes long before, and at the time when, &c., was the collector of the internal revenue of the United States for the first collection district of Pennsylvania; and the said James N. Kerns and Albert L. Magilton at the same time were deputy collectors thereof for the same district.

"And that the said William H. Barnes, being the collector of the internal revenue of the United States for the said district as aforesaid, did duly notify the said plaintiffs that the said tax so assessed against them was due and payable on or before the said last day of March, 1870, as aforesaid; and that unless the same should be paid on or before that day, it would become his duty to collect the same, together with a penalty of five per centum additional thereto, and interest at the rate of one per centum per month from the time when the said tax was due and payable.

"And the said defendants further say, that the said tax was not paid by the said plaintiffs to the said William H. Barnes, collector as aforesaid, on or before the said last day of March, 1870; whereupon afterwards, and long before the time when, &c., to wit, on the 21st day of April, 1870, he, the said William H. Barnes, collector as aforesaid, did, in due form, demand payment thereof by the said plaintiffs, together with five per centum additional thereto, and such interest as might accrue before payment; and did further notify the said plaintiffs that if the said tax, penalty, and interest should not be paid within ten days from the making of the said demand, he would make distraint therefor as provided by law.

"And the said defendants further say, that, notwithstanding the said notice and demand, the said tax, together with the five per centum additional thereto, and the interest accrued thereupon as aforesaid, was, on the aforesaid 5th day of May, 1870, and at the said time when, &c., yet wholly due and unpaid by the said plaintiffs; wherefore the said William H. Barnes, collector as aforesaid, and the said James N. Kerns and Albert L. Magilton, deputy collectors as aforesaid, by his command on the said day when, &c., did enter into and upon the said building of the said plaintiffs, situate at the corner of Fourth street and Willing's alley, in the city of Philadelphia, in which, &c., and did then and there seize, take, and distrain the said goods and chattels in the said declaration mentioned, as and for a distress for the said tax, and together with the five per centum additional thereto, and the interest accrued therefrom as aforesaid, and took and seized the same thereon as such distress as aforesaid, on the most fit and convenient part thereof for that purpose, according to the form of the statute in such case made and provided, which are the same supposed trespasses in the introductory part of this plea mentioned; and this the said defendants are ready to verify, &c.; wherefore they pray judgment if the said plaintiffs ought to have and maintain their aforesaid action thereof against them, &c."

The demurrer was sustained by the court below, and this ruling is the error complained of.

In each of the other cases the plea mentioned is of the same general import as the above, differing only in some unimportant particulars.

Thus, in No. 135 the distress was for the collection of the tax, penalty, and accrued interest on a dividend declared December 14, 1869, and payable on and after January 15, 1870, in respect of earnings, profits, and gains made between October 1, 1869, and December 1, 1869.

In No. 136 it was for the collection of the tax, penalty, &c., on interest due January 1, 1870, on bonds; the interest being for the six months preceding that date.

In No. 137 it was for the collection of the tax, penalty, &c., on interest due as in No. 136.

In No. 138 it was for the collection of the tax, penalty, &c., on a dividend declared January 10, 1870, and payable same day, in respect of gains made between July 1, 1869, and January 1, 1870, and also on interest due as in No. 136.

In No. 139 it was for the collection of the tax, penalty, &c., on a dividend declared January 19, 1870, and payable on and after February 1, 1870, in respect of earnings and profits made between July 1, 1869, and December 31, 1869, and also on a surplus of the same earnings and profits set apart, after the dividend was declared, for construction and repairs.

The tax, penalty &c., for the collection whereof the distress in these cases respectively was made, were claimed under the provisions of the 122d section of the act of June 30, 1864, as amended by the 9th section of the act of July 13, 1866, (13 Stat., 284; 14 Stat., 138,) which enacts as follows:

> "That any railroad, canal, turnpike, canal navigation, or slack-water company, indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip or money, due or payable to its stockholders, including non-residents, whether citizens or aliens, as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a tax of five per centum on the amount of all such interest, or coupons, dividends, or profits, whenever and wherever the same shall be payable, and to whatever party or person the same may be payable, including non-residents, whether citizens or aliens; and said companies are hereby authorized to deduct and withhold from all payments on account of any interest, or coupons, and dividends, due and payable as aforesaid, the tax of five per centum; and the payment of the amount of said tax so deducted from the interest, or coupons, or dividends, and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend, or interest, or coupon, on the bonds or other evidences of their indebtedness so held by any person or party whatever, except where said

companies may have contracted otherwise. And a list or return shall be made and rendered to the assessor or assistant assessor, on or before the tenth day of the month following that in which said interest, coupons, or dividends become due and payable, and as often as every six months; and said list or return shall contain a true and faithful account of the amount of tax, and there shall be annexed thereto a declaration of the president or treasurer of the company, under oath or affirmation, in form and manner as may be prescribed by the Commissioner of Internal Revenue, that the same contains a true and faithful account of said tax. And for any default in making or rendering such list or return, with the declaration annexed, or of the payment of the tax as aforesaid, the company making such default shall forfeit as a penalty the sum of one thousand dollars; and in case of any default in making or rendering said list or return, or of the payment of the tax or any part thereof, as aforesaid, the assessment and collection of the tax and penalty shall be made according to the provisions of the law in other cases of neglect or refusal: *Provided*, That whenever any of the companies mentioned in this section shall be unable to pay the interest on their indebtedness, and shall, in fact, fail to pay such interest, that in such cases the tax levied by this section shall not be paid to the United States until said company resume the payment of interest on their indebtedness."

By the 116th section of the act of June 30, 1864, as amended by the 13th section of the act of March 2, 1867, (13 Stat., 281; 14 Stat., 477,) it is provided:

"That there shall be levied, collected, and paid annually upon the gains, profits, and income of every person residing in the United States, or of any citizen of the United States residing abroad, whether derived from any kind of property, rents, interest, dividends, or salaries, or from any profession, trade, employment, or vocation, carried on in the United States or elsewhere, or from any other source whatever, a tax of five per centum on the amount so derived over one thousand dollars, and a like tax shall be levied, collected, and paid annually upon the gains, profits, and income of every business, trade, or profession carried on in the United States by persons residing without the United States, and not citizens thereof. And the tax herein provided for shall be assessed, collected, and paid upon the gains, profits, and income for the year ending the thirty-first day of December next preceding the time for levying, collecting, and paying said tax."

And by the 119th section of the act of June 30, 1864, as amended by the 13th section of the act of March 2, 1867, (13 Stats., 283; 14 Stats., 480,) it is further provided—

"That the taxes on incomes herein imposed shall be levied on the first day of March, and be due and payable on or before the thirtieth day of April in each year, until and including the year eighteen hundred and seventy, and no longer; and to any sum or sums annually due and unpaid after the thirtieth of April, as aforesaid, and for ten days after notice and demand thereof by the collector, there shall be levied in addition thereto the sum of five per centum on the amount of taxes unpaid, and interest at the rate of one per centum per month upon said tax, from the time the same became due, as a penalty, except from the estates of deceased, insane, or insolvent persons: *Provided*, That the tax on incomes for the year eighteen hundred and sixty-six shall be levied on the day this act takes effect."

The principal question involved in these cases is, whether the duration of the tax upon "interest, or coupons, dividends, or profits" of railroad, canal, and other companies, imposed by the 122d section, quoted above, is subject to the limitation fixed by the above-quoted 119th section, taken in connection with the above-quoted 116th section. In other words, whether a tax upon the profits, interest, or dividends mentioned in the said 122d section is authorized to be assessed and collected, where such profits were set apart or where such interest or dividends became due and payable *after* the 31st of December, 1869. We claim that the limitation referred to is not applicable to the tax described in the 122d section—that the assessment and collection thereof, upon interest, dividends, &c., due and payable subsequent to that date, were authorized; and in support of this view submit what follows:

I.

The 49th section of the act of August 1, 1861, (12 Stats., 309,) imposed upon the "annual income of every person residing in the United States," whether derived "from any kind of property, or from any profession, trade, employment, or vocation carried on in the United States or elsewhere, or from any other source whatever," a tax of 3 per cent. on the excess thereof above $800, with a proviso that income derived from interest on Treasury notes or other securities of the United States should be taxed 1½ per cent. only. Upon the "income, rents, or dividends accruing upon any property, securities, or stocks owned in the United States by any citizen of the United States residing abroad," a tax of 5 per cent. was imposed, excepting, however, such income as should be derived from interest on Treasury notes or other Government securities, on which a tax of 1½ per cent. was imposed. The same section provided that these duties should be assessed upon the annual income for the year next preceding the first of January, 1862, and by the 51st section they became due and payable on or before the 30th of June, 1862.

Under this legislation, which is the earliest on the subject, it is very clear that interest on railway bonds, and also dividends and surplus profits of railway companies, were subjects of taxation only in so far as they constituted the annual dutiable income of persons residing in the United States, or of citizens of the United States residing abroad.

But by the 81st section of the act of July 1, 1862, (12 Stats., 469,) the interest and dividends just mentioned, in regard to taxation, were placed under separate and distinct regulation. They were subjected, on and after that date, to a duty of 3 per cent. upon the amount thereof whenever the same should be paid. This duty was to be assessed directly upon any person or persons owning, possessing, or having the care or management of any railroad company or railroad corporation, by whom a list or return was required to be made and rendered to the Commissioner of Internal Revenue within thirty days after the time when the interest or dividends became due and payable, and at all events as often as every six months. Similar provisions were contained in the 80th section, for levying and collecting a tax upon the gross receipts of railroads, steamboats, ferry-boats, bridges, &c.; also in the 82d, 83d, 84th, and 85th sections, for levying and collecting a tax upon the dividends and gains of banks, trust companies, savings institutions, and insurance companies; also in the 86th section, for levying and collecting a tax upon the salaries and pay of persons in the service of the United States; and also in the 88th section, for levying and collecting a tax upon the gross receipts obtained from advertisements.

The 89th section of the act repealed so much of the act of August 1, 1861, as related to income tax; expressly declaring that this was done for the purpose of modifying and re-enacting the same as *thereinafter* provided. Then, by the 90th section, it was enacted that there should be levied, collected, and paid "annually, upon the annual gains, profits, or income of every person residing in the United States, whether derived from any kind of property, rents, interest, dividends, salaries, or from any profession, trade, employment, or vocation carried on in the United States or elsewhere, or from any other source whatever," except as thereinafter mentioned, &c., a duty of 3 or 5 per cent. according to the amount; and "upon the annual gains, profits, or income, rents, and dividends accruing upon any property, securities, and stocks owned in the United States by any citizen of the United States residing abroad," except as thereinafter mentioned, &c., a duty of 5 per cent. What the exceptions referred to in this section are, we learn by reference to the next section, the 91st, which prescribed the mode for estimating the said "annual gains, profits, or income." Here we find that those exceptions embrace, among other things, all gains, profits, or income derived from the sources mentioned in the 80th, 81st, 82d, 83d, 84th, 85th, 86th, and 88th sections, to which we have above alluded. It follows that the income derived from these sources was not in any respect a constituent of the annual income upon which a duty was imposed by the 90th section, but, on the contrary, that it (or rather, the sources from which it was derived) formed an independent subject of taxation, under separate and distinct provisions of law.

The 91st section furthermore declared, that the duty therein provided for should be assessed and collected upon the income "for the year ending the 31st day of December next preceding the time for levying and collecting said duty, that is to say, on the 1st of May, 1863, and in each year thereafter." And by the 92d section it was provided that the duties on incomes therein imposed should be due and payable on or before the 30th of June in the year 1863, and in each year thereafter, until and including the year 1866, and no longer.

Unquestionably, the first of these provisions applies solely to the annual income duty imposed by the 90th section; and we think it quite clear that the other provision applies to the same duty, and to no other. Thus, it is restricted to "duties on incomes," and the only duties affecting incomes which are expressly laid as an income tax and described as such in the act, are those imposed by the 90th section. Again, it relates to duties which are required to be assessed annually, making them due and payable on or before a particular day of each year; and, therefore, necessarily excludes from its operation such duties as by other provisions of the act are to be assessed and are made to fall due otherwise than annually; for instance, the tax on railroad dividends, &c. These, and other considerations which might be urged, place it beyond doubt that the limitation upon the duration of duties on incomes, as fixed by the 91st and 92d sections of the act of 1862, was applicable to the tax imposed by the 90th section of that act alone, and not to any of the taxes imposed by the other sections mentioned. Accordingly, as this was the only limitation prescribed, the latter taxes, which embraced the duty upon railroad dividends, and upon interest on railroad bonds, &c., were, under the provisions of that act, permanent, not temporary, in their character.

II.

So stood the law at the time of the passage of the internal revenue act of June 30, 1864, (13 Stats., 223,) by which all of the previous provisions above referred to were repealed, and their places supplied by others; and the inquiry now is, whether, under that act and its supplements, the character of the duty upon railroad dividends, &c , was changed, and this duty made temporary, instead of permanent as it formerly was.

The 116th section of the act of 1864, as amended by the 13th section of the act of March 2, 1867, which will be found quoted entire on page 7 of this brief, provides, generally, that there shall be levied, collected, and paid annually upon the gains, profits, and income of every person residing in the United States, or of any citizen of the United States residing abroad, derived from any source whatever, a tax of five per cent. on the excess over $1,000; and that a like tax shall be levied, collected, and paid annually upon the gains, profits, and income of every business, trade, or profession carried on in the United States by persons residing without the United States and not citizens thereof. It then declares that the tax therein provided shall be assessed, collected, and paid upon the gains, profits, and income for the year ending the 31st of December next preceding the time for levying, collecting, and paying said tax. This time is fixed by the 119th section of the act of 1864, as amended by the said 13th section, which will also be found quoted entire on page 8 of this brief, and to which we will hereinafter more particularly refer.

The 117th section of the act of 1864, as amended by the 13th section of the act of March 2, 1867, (13 Stats., 281; 14 Stats., 478,) next makes provision for "estimating the gains, profits, and income of *any person.*" It prescribes what shall be included in the estimate, and what shall be excepted from the estimate, and likewise what shall be deducted from the gains, profits, or income that are required to be embraced in the estimate. This section undoubtedly, *in legal effect*, qualifies the preceding 116th section as regards the subjects of taxation to which that section applies, by necessarily limiting its operation and thus restricting its provisions to those gains, profits, and income which are required to be included in the estimate referred to. *Whatever income, therefore, may be excepted from that estimate under the authority of the* 117*th section, cannot properly be regarded as comprehended by the* 116*th section*, or, in other words, as constituting income on which a duty is imposed by the latter section. Now, among the exceptions from the estimate which are authorized to be made by the 117th section, is "the amount of income received from institutions or corporations whose officers, as required by law, withhold a per centum of the dividends made by such institutions, and pay the same to the officer authorized to receive the same;" and it is very manifest that this exception includes all income obtained from the sources mentioned in the 122d section of the act of 1864, as amended by the 9th section of the act of July 13, 1866, which we have quoted entire on page 6 of this brief—that is to say, interest on railroad bonds, railroad dividends, &c. The conclusion, then, is unavoidable, that the provisions of the 116th section do not extend to gains, profits, and income derived from the sources just referred to. This is equally true respecting such as are drawn from the sources named in the 120th, 121st, and 123d sections of the act of 1864, as amended by the acts of 1866 and 1867.

But another consideration leading directly to the same result is this, *that the two sections do not altogether coincide as to the persons affected by the tax*, and that in this respect the provisions of section 116, so far as they relate to income derived from "interest, dividends," &c., are *much narrower in their bearing and operation* than the provisions of section 122 imposing a duty upon railroad dividends, &c. Thus, under the former, it is only persons residing in the United States and citizens of the United States residing abroad, whose income, when derived from interest or dividends, is liable to taxation; while under the latter the tax attaches to interest and dividends to "whatsoever party or person the same may be payable, *including non-residents*, WHETHER CITIZENS OR ALIENS." This circumstance alone would seem to be decisive. It shows that the duty imposed by the 122d section is, in part at least, wholly new, and necessarily separate and distinct from that imposed by the 116th section; and if such is its character as to a part, it must, we think, be deemed to be separate and distinct as to the whole—this being in entire harmony with other provisions of the statute, namely, those relating to the time and mode of the return, assessment, collection, &c., which, according as they are applicable to the tax imposed by the one or by the other section, are altogether different. Moreover, the 116th section contemplates an annual charge only, which becomes due at a fixed date; whereas the 122d section provides for a charge which, in its nature, is occasional, and may become due quarterly, semi-annually, or, so far as dividends are concerned, at irregular periods, and is thus fundamentally distinct from the other.

Recurring, now, to the before-mentioned 119th section, we find that it enacts, "That the taxes on incomes herein imposed shall be levied on the 1st day of March, and be due and payable on or before the 30th day of April, in each year, until and including the year 1870, and no longer," with a proviso "that the tax on incomes for the year 1866 shall be levied on the day that this act takes effect." It will be observed that this section imposes no tax; so that the "taxes on incomes" therein referred to must be understood to mean such as are imposed elsewhere in the act. That the enactment, however, was intended to apply to the annual income tax imposed by the 116th section, *and to that only*, is manifest.

One of its objects clearly was, to fix the time for levying, collecting, and paying that same tax, which by the last-named section was left undetermined. This connection between the two sections is apparent from the terms of each, and also from the aforesaid proviso, the language of which at the same time indicates what is meant by "taxes on incomes" as used in the preceding portion of the section to which it belongs. The date fixed in that portion of the section for levying the tax is the 1st of March, while the date of the act itself is the 2d of March, 1867, and the purpose of the proviso was to require the annual income tax for the year 1866, which, under the pre-existing law, was not leviable until the 1st of May, to be levied on the day of the passage of the act, and thereafter (under the operation of the general provision fixing the time of the levy) on the 1st of March. In the very nature of things, the proviso could not have had any reference to the duty upon interest on railroad bonds and upon railroad dividends for 1866, because this must already have been levied and paid in whole or in part under the previous law.

Another of its objects was to fix the duration of the particular tax, for the levy, collection, and payment whereof certain dates are therein prescribed. The limitation provided is applicable to that tax, and to no other; and it has been conclusively established, as we think, that the tax here referred to is the annual income tax imposed by the 116th section, the provisions of which, we have already shown, do not extend to the sources of income named in the 122d section.

III.

If the views just presented are correct, it would seem to follow, inevitably, that the act of June 30, 1864, and its supplements, effected no change whatever in the character of the duty upon railroad dividends, &c., but that this duty remained thereunder, as it was previously, permanent; that is to say, not limited in duration by virtue of any provision therein contained.

And such has been the understanding of the legislative branch of the Government, as is plain from the language employed in the subsequent act of July 14, 1870, entitled "An act to reduce internal taxes, and for other purposes." (16 Stat., 256.) This act provides for a continuance of the annual income tax, (which had already expired under the limitation contained in the aforesaid 119th section,) with some modifications, during the year 1870, and also during the year 1871; and the 7th section thereof requires that, in estimating the income, there shall be excepted that portion of the salary or pay of any person in the public service "from which, *under authority of acts of Congress previous hereto*, [thereto.] a tax of five per centum shall have been withheld;" also, "the amount received from any corporation whose officers, *as authorized by law*, withhold and pay," &c. Compare, also, similar clauses in section 11 of the same act. Taking these provisions together, they indicate that, in framing them, the legislature must have acted upon the assumption that there existed up to that time, by virtue of previous acts, authority to withhold a tax from the sources therein designated.

But, furthermore, the 17th section of the act declares that sections 120, 121, 122, and 123 of the act of 1864, as amended by the acts of 1866 and 1867, "shall be construed to impose the taxes therein mentioned to the 1st of August, 1870, but after that date no further taxes shall be levied or assessed under said sections." There is nothing in the terms of this provision which shows that it was intended to operate otherwise than prospectively, or that it was designed to place a legislative interpretation upon the sections named with a view to impart to them a retroactive effect. It is entirely consistent with the assumption that these sections were still in full vigor. What gave rise to it was, perhaps, this: The 15th section of the act having provided for levying and collecting a tax of 2½ per cent. on the amount of all interest or coupons paid on bonds, &c., *for the year* 1871, and also a similar tax "on the amount of all dividends of earnings, income, or gains *hereinafter* [thereinafter] declared, by any bank, trust company," &c., there would, without some explanatory enactment, have been room for doubt whether or not it was thereby intended that the five per cent. tax imposed by the previous law, and described in the sections referred to, was to continue on until the year 1871 as to the interest, but was to immediately cease as to the dividends—a construction of which the said 15th section, standing alone, was susceptible; and to remove all doubt, and more plainly manifest the will of the legislature on the subject, it was enacted that those sections should be "construed to impose the taxes therein mentioned to the 1st day of August, 1870," and no longer. Thus the provision alluded to is only another indication that Congress, at the time of the passage of the act in which it appears, regarded the sections designated above as unaffected by the limitation contained in the 11th section of the act of 1864, and as still in force. 9

IV.

The views which have mainly been urged on the opposite side of the question involved in these cases, rest altogether upon the assumption that the tax imposed by the 122d section upon dividends made by the companies therein mentioned, and upon the interest payable by them, is a part of the tax imposed by the 116th section. We think the error of this assumption sufficiently appears from what is hereinbefore submitted.

It is true that both of these sections, when taken in a general sense, relate to the same subject, namely, income taxation; but they each, in their provisions, concern only particular parts of that subject, and operate respectively upon entirely different constituents of income. As regards income derived from interest and dividends especially, one of them includes a class of persons not included by the other, and is in that respect more comprehensive than that other. The two sections are, indeed, special in their character, both with reference to the tax imposed and the mode prescribed for collecting the same. If, at any time while the income tax law was in force, the 116th section had been repealed altogether, by name, unquestionably the 122d section would have remained unaffected by the repeal—the latter section being nowise dependent on the other, but capable of subsisting and of operating irrespective thereof with reference to the particular taxable objects to which it relates. We are unable to perceive why a provision which places a limitation upon the duration of the tax imposed by the former section, such provision applying to that tax exclusively, should not lead to a similar consequence, and the 122d section be regarded as remaining unaffected by that limitation.

The case of Railroad Company *vs.* Jackson, (7 Wall., 262,) has been supposed to favor the position that the duty imposed by the 122d section is a portion of that imposed by the 116th section. We do not so understand it. The question considered by the court there was, whether under the act of June 30, 1864, (as the act stood before it was amended,) interest coupons due on railroad bonds belonging to a non-resident alien were liable to taxation; and it was held that they were not. The solution of the question did not depend upon whether the *objects of taxation* mentioned in the one section constituted a part of those contained in the other, but whether the *description of persons* affected by the tax was the same in each.

The recent case of Brainard *vs.* Hubbard, No. 122, December term, 1870, which involved the construction of the 117th section of the act of June 30, 1864, in regard to undivided gains of manufacturing corporations, has no direct bearing upon the matter in hand.

V.

The limitation upon the duration of the tax on incomes imposed by the said 119th section being, as we have shown, inapplicable to the tax upon interest or coupons, dividends, or profits, imposed by the said 122d section, the plaintiffs in error were fully warranted in collecting the taxes referred to in the pleadings; and it is submitted that the court below, therefore, erred in sustaining the demurrer to their plea of justification in the several cases.

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B. H. BRISTOW,
Solicitor General.

BARNES vs. THE PHILAD'A & READING R. R. CO.

DECEMBER TERM, 1870. No. 334.

SAME vs. SAME.

DECEMBER TERM, 1870. No. 337.

SAME vs. THE LEHIGH VALLEY R. R. CO.

DECEMBER TERM, 1870. No. 335.

SAME vs. THE LAKE SUPERIOR & MISS. R. R. CO.

DECEMBER TERM, 1870. No. 336.

BRIEF OF DEFENDANTS IN ERROR

THE LEISENRING PRINTING HOUSE, 237 & 239 DOCK ST., PHILADELPHIA.

BARNES *vs.* THE PHILADELPHIA AND READING RAILROAD COMPANY.

Writs of Error, December, 1870. Nos. 334, 337.

SAME *vs.* THE LEHIGH VALLEY RAILROAD COMPANY.

Writ of Error, December, 1870. No. 335.

SAME *vs.* THE LAKE SUPERIOR AND MISSISSIPPI RAILROAD COMPANY.

Writ of Error, December, 1870. No. 336.

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These are writs of error to the Circuit Court of the United States for the Eastern District of Pennsylvania, brought by the plaintiffs in error, who were defendants below, to determine whether the court erred in holding them liable for trespasses committed in distraining the goods of the plaintiffs below (defendants in error here) for the non-payment of taxes claimed to be due on certain dividends on stock and interest on bonds which had accrued and were paid by the plaintiffs below in the month of January, 1870. The defendants below were collectors of internal revenue under the laws of the United States, and they pleaded, in justification of the distraints, that the plaintiffs below were liable for the taxes in question. The plaintiffs below demurred to the pleas, and thus presented the questions whether, under the 122d section of the internal revenue act of June 30th, 1864, (13 Stat. at Large, page 284,) as amended by the 9th section of the act of July 13th, 1866, (14 Stat. at Large, page 138; see also Brightly's Digest, vol. 2, page 364, pl. 300,) dividends declared in the month of December, 1869, but payable in the month of January, 1870, and interest paid in the month of January, 1870, were liable to a tax.

The dividend of the Philadelphia and Reading Railroad Company was declared on the 22d of December, 1869, as payable on and after the 17th of January, 1870, and is the subject of writ of error No. 334. The interest paid by the same company was due and payable on the 1st of January, 1870, and is the subject of writ of error No. 337. The dividend paid by the Lehigh Valley Railroad Company was declared on the 14th of December, 1869, as payable on and after the 15th of January, 1870, and is the subject of writ of error No. 335.

The interest paid by the Lake Superior and Mississippi Railroad Company was due and payable on the 1st of January, 1870, and is the subject of wri of error No. 336.

While the causes were pending, and before judgment had been entered on the demurrers, Congress passed the act of July 14th, 1870, entitled "An act to reduce internal taxes and for other purposes," the 17th section of which provided, *inter alia*, that the 122d section of the act of 1864, as amended, should "be construed to impose the taxes therein mentioned to the 1st day of August, 1870." The effect of this provision is, therefore, another question in the causes.

BRIEF OF DEFENDANTS IN ERROR.

FIRST POINT.—*That the income-tax law which was in force on the 31st of December, 1869, did not apply to incomes accruing after that day.*

A comparison of the various statutes which have from time to time been passed, in reference to the income tax, will leave no room for doubt that income accruing during the year 1869 was the last to which the tax was applicable. The latest statutory provisions on the subject were those contained in the 13th section of the act of Congress approved March 2d, 1867, (14 Stat. at Large, page 477,) entitled "An act to amend existing laws relating to internal revenue and for other purposes." It is there enacted that the income tax therein provided for "shall be assessed, collected and paid upon the gains, profits and income for the year ending the thirty-first day of December next preceding the time for levying, collecting and paying said tax;" and "that the taxes on incomes herein imposed shall be levied on the first day of March, and be due and payable on or before the thirtieth day of April, in each year, until and including the year 1870, and no longer." The period from the first day of March to the thirtieth day of April, 1870, being thus made the last for the levying, collecting and paying the income tax, it is evident that the year ending with the thirty-first day of December last preceding that period, or the year 1869, was the last on the income of which the tax was to be collected.

SECOND POINT.—*That the five per cent. tax chargeable on interest and dividends, payable by railroad and certain other corporations, under the 122d section of the act of June 30th, 1864, entitled "An act to provide internal revenue to support the Government, to pay interest on the public debt and for other purposes,"* (Stat. at Large, vol. 13, page 284,) *as amended by the 9th section of the act of July 13th, 1866,* (Stat. at Large, vol. 14, page 138; see also Brightly's Digest, vol. 2, page 364, pl. 302,) *was part of and expired with the general income tax which was in force on the 31st day of December, 1869.*

The act of June 30th, 1864, was obviously intended to replace, as far as possible, all previous enactments on the subject of internal revenue. It has been amended and re-amended in many important particulars, but still forms the ground-work on which the whole system of internal revenue is based. These amendments affect some of its provisions in regard to the income tax, but not in any point material to the subject under consideration.

The sections in this act relating to the income tax begin with the 116th and end with the 122d.

The 116th section provides for the levy and collection of an income tax, graduated according to the amount of income, "upon the annual gains, profits, or income of every person residing in the United States, or of any citizen of the United States residing abroad, whether derived from any kind of property, rents, interests, dividends, or salaries, or from any profession, trade, employment, or vocation carried on in the United States, or elsewhere, or from any other source whatever, except as hereinafter [thereinafter] mentioned."

The 117th section authorizes certain deductions to be made in estimating income, among which are (1) the excess over six hundred dollars of official salaries paid by the United States, and (2) the income derived from dividends or shares in the capital stock of any bank, trust company, savings institution, insurance, railroad, canal, navigation or slackwater company, and "the interest on any bonds or other evidences of indebtedness of any such corporation or company which shall have been assessed and paid," as thereinafter provided. Where the salary or other compensation paid to a person in the service of the United States does not exceed $600 per annum, or when it is paid by fees, or is otherwise uncertain or irregular in amount, it must be included in the taxable income of the person receiving such salary or other compensation, in such manner as the Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, may prescribe.

The 118th and 119th sections relate to the manner of making returns of income and collecting the tax thereon.

The 120th section imposes a duty of five per centum "on all dividends in scrip or money thereafter declared due, and whenever the same shall be payable to stockholders, policy-holders, or depositors, as part of the earnings, income or gains of any bank, trust company or savings institution, and of any fire, marine, life, inland insurance company, either stock or mutual; * * *

and on all undistributed sums, or sums made or added during the year to their surplus or contingent funds;" and authorizes "said banks, trust companies, savings institutions and insurance companies" "to withhold, from all payments made on account of any dividends or sums of money that may be due and payable as aforesaid, the said duty of five per centum."

The 121st section declares that any bank, legally authorized to issue notes as circulation, which shall neglect or omit to make dividends or additions to its surplus or contingent fund as often as once in six months, shall make a return on the first day of January and July in each year, or within thirty days thereafter, of the amount of profits which have accrued, or been carned and received by said bank during the preceding six months, and pay a tax of five per centum on such profits; a proviso, however, being added, "that when any dividend is made which includes any part of the surplus or contingent fund of any bank, trust company, savings institution, insurance or railroad company, which has been assessed and the duty paid thereon, the amount of the duty so paid on that portion of the surplus or contingent fund may be deducted from the duty on such dividend."

The 122d section provides "that any railroad, canal, turnpike, canal, navigation or slackwater company, indebted for any money, for which bonds or other evidences of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip or money due or payable to its stockholders as part of the earnings, profits, income or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to, and pay a duty of, five per centum on the amount of all such interest or coupons, dividends or profits, whenever the same shall be payable," and that the companies "shall be authorized to deduct and withhold, from all payments on account of any interest or coupons or dividends due and payable as aforesaid, the duty of five per centum."

The 123d section makes provision for levying a tax of five per centum upon the excess above six hundred dollars of salaries paid by the United States and for the deduction of the said tax by the disbursing officers charged with the payment of such salaries.

It will be perceived, from this summary, that the collocation of the several sections relating, or which may be supposed to relate, to the income tax, is in exact accordance with the theory that the sections following the 117th were intended to provide for the collection of the tax upon the several kinds of income for which, under that section, the tax-payer was not personally responsible. And it may be further remarked that all the sections, from the 116th to the 125th, both inclusive, embracing of course those which refer to the tax on interest and dividends, and to the tax on salaries of United States officers, are placed under the title "income."

The absence of any express words limiting the period within which dividends and interest payable by railroads and certain other corporations shall be taxed, may, perhaps, be considered an argument in favor of the theory that the tax on dividends and interest survived the income tax. It would seem that but little importance should be attached to this view of the subject. It is true that the sections relating to the tax on interest and dividends contain no express words limiting the time for its collection; but this omission is material only on the assumption that the tax referred to was not intended to be a part of the income tax. If it was so intended, there was no occasion for re-enacting the preceding clause of limitation. When provision had been made for the cessation of the tax upon an entire income, it certainly was unnecessary to provide that it should not continue as to parts of that income. Suppose one section of the act had simply declared that a tax should be levied for a certain period upon the income of every citizen, that the tax upon income derived from all sources except the stock and bonds of certain corporations should be paid by the citizen himself, but that the tax upon the dividends and interest receivable from such stocks and bonds should be paid as provided in a subsequent section, and that the section thus referred to required corporations paying such interest or dividends to deduct the tax therefrom, would any one contend that the omission to declare that this deduction should not continue after the expiration of the period during which the income tax was collectable rendered the tax chargeable on dividends or interest of indefinite duration ? And yet the case supposed is in no material respect different from that actually presented by the act as passed.

Treating then the omission to repeat the clause of limitation in connection with each section of the act relating to the taxation of dividends and interest as immaterial, the words and context of the law seem to warrant the conclusion that the tax on the interest and dividends payable by certain corporations was imposed merely as a mode of collecting the income tax chargeable on the revenue derived from the bonds and stocks of such corporations.

Is there anything in the reason or spirit of the law inconsistent with this conclusion ? It seems, on the contrary, that the conclusion reached is in entire accordance with the obvious intent and meaning of the act. The object in view was to impose a tax upon "the annual gains, profits, or income of every person residing in the United States, or of any citizen of the United States residing abroad, whether derived from any kind of property, rents, interests, dividends, salaries," &c. Why should it be supposed that income derivable from bonds and stocks of railroad and certain other corporations was intended to be taxed after income from other sources was freed from taxation? We cannot presume that Congress meant to discriminate against investments in the stocks and bonds of the corporations referred to by continuing the tax against them alone. Why should the owner of a railroad bond pay a tax on the interest which he receives, when the owner of the bond of an individual receives his interest clear of taxation ? If Congress had intended to discourage investments in the bonds of railroad companies, such a distinction would be intelligible; but in a country, the development of whose material resources is so largely dependent upon the maintenance and extension of railways, the imputation of such an intention would be simply absurd. The same remark is equally applicable to investments in railroad stocks as contrasted with investments in other securities.

There is another consideration which is entitled to great weight, and that is, that the taxability of salaries paid to officers, civil, military or naval, of the United States must be determined by the same rule that applies to the taxability of interest or dividends. The act of 1864 required the deduction of five per cent. to be made from such salaries just as it required a deduction of five per cent. to be made from interests and dividends payable by railroad companies. Is it to be supposed that Congress meant to single out the income of officers in the employment of the Government for special taxation for an indefinite period? And yet, if the tax on income from bonds and stocks was continued, the tax on salaries must have been continued also.

But, in fact, the question which we have been discussing is not an open one. The decision of the Supreme Court of the United States in Jackson *vs.* The Railroad Company, 7 Wallace, 262, has conclusively determined that the tax on interest and dividends was but an incident of the general income tax. In that case the question was, whether the act of 1864 required a railroad company to deduct the five per cent. tax from the interest payable to a non-resident foreign holder of its bonds. Chief Justice Chase had held, on the trial in the Circuit Court, that the deduction was neither authorized nor required; because, as the law then stood, the bondholder, being a non-resident alien, was not liable to income tax, and the deduction of the five per cent. tax was intended merely to secure the payment of income tax chargeable on the bonds; and the Supreme Court affirmed the correctness of this view. "The decision," said Mr. Justice Nelson, by whom the opinion of the court was delivered, "was placed mainly on the ground that, looking at the several provisions bearing upon the question, and giving to them a reasonable construction, it was believed not to be the intent of Congress to impose an income tax on non-resident aliens; that they were not only not included in the description of persons upon whom the tax was imposed, but were impliedly excluded by confining it to residents of the United States and citizens residing abroad, and that the deduction from the prescribed income of the interest on these railroad bonds, when paid by the companies, was regarded as simply a mode of collecting this part of the income tax. We concur in this view."

On the whole, therefore, there would seem to be no reason to doubt that the tax on interest and dividends was but an incident of the general income tax; and that income accruing from the bonds and stocks of railroad companies, after the thirty-first day of December, 1869, is as free from taxation as income accruing after that day from any other source.

THIRD POINT.—*That the sum paid as interest by the Philadelphia and Reading and Lake Superior and Mississippi Railroad Companies, on the 1st of January, 1870, that paid as dividend by the Lehigh Valley Railroad Company on the 15th of January, 1870, and that paid as dividend by the Philadelphia and Reading Railroad Company on the seventeenth of the same month, must be treated as income of the recipients for the year 1870 and not the year 1869.*

As to the *interest* paid on the first day of January, 1870, it is difficult to see how any doubt can exist as to the year to which it should be appropriated. Beyond all question it was income of the bondholders for the year 1870. Money paid on, and not due before, the first day of January, 1870, cannot, with any reason, be treated as part of the "gains, profits, or income" of the recipient "for the year ending the thirty-first day of December," 1869. Suppose a tax-payer to have made out his income return for the year 1869 immediately at the close of that year, it certainly could not be pretended that the return was defective because it did not contain a sum which fell due, and was received on the first day of January, 1870, after the return had been made out; and if this is so, why should the character of the return be affected by delay in preparing it? Even if the law were so unreasonable as to require money due, but unpaid, to be computed as part of the income of the year in which it should have been paid, interest payable on a bond on the first day of January is not due, either in whole or part, until the first day of January. The bondholder has no claim whatever for it, or any portion of it, on the preceding thirty-first day of December. There is no rule by which it can be apportioned. It is due and payable *in solido*. Interest which fell due on the first day of January, 1869, was undoubtedly taxable as part of the income of that year; and if the interest which fell due on the first day of January, 1870, is also taxable as part of the income of 1869, we would have the anomaly of *eighteen months'* interest being taxed as the income of *one year*.

The interest paid by certain corporations on or after the first day of September, 1862, was the first to which the law requiring a deduction to be made was applicable. That deduction was intended to secure the income tax for the year 1862, chargeable on such interest; but if the officers of a corporation which paid annual interest on the first of September, 1862, had undertaken to apportion eight-twelfths of the interest to the year 1862, and four-twelfths to the year 1861, and returned the tax on the eight-twelfths only, it is very certain that the corporation would have been held responsible for the tax on the entire interest. The Commissioner of Internal Revenue would have held that interest due and paid in the year 1862 was income of 1862, and, by the same rule, interest due and paid on the first day of January, 1870, must be treated as income of 1870, and not of 1869.

As to the dividends which fell due and were paid respectively on the fifteenth and seventeenth of January, 1870, the fact of their having been declared in December, 1869, and having been paid out of the net earnings for fiscal years ending in 1869, the same rule must apply; since there is no real distinction between the case of the money paid to the bondholders as interest and that paid to the stockholders as dividend, and both sums are to be treated as income of the recipients for the year 1870. The dividend money did not become the property of the stockholders, individually, until it was paid to them. It was income of the company until actually divided. Can it be said that any stockholder of the Philadelphia and Reading Railroad Company received, during the year 1869, the dividend paid on his stock on the seventeenth day of January, 1870? Would he have been obliged to include it in his return of income for 1869 if a return had been required before the day on which the dividend was actually paid? If these questions are answered in the negative,—and it is not seen how they can be otherwise answered,—then, assuredly, the dividend paid by the company on the seventeenth of January, 1870, formed no part of the income of the stockholders for the year 1869.

It is quite clear that the first income-tax act enforced was held applicable to all dividends paid to stockholders of incorporated companies during the first year (1862) included within its operation, irrespective of the periods during which the dividends had been earned. A stockholder who received his dividend on the first day of January, 1862, was not excused from paying income tax on that dividend because it had been earned in the year 1861. The circular issued by Commissioner Lewis on the thirty-first of May, 1863, declared that "the tax must be levied upon all dividends declared prior to September 1st, 1862, and upon six hundred dollars of all salaries of officers or payment to persons in the civil, military or naval, or other service of the United States, for services rendered prior to said date, as such dividends and proportion of salaries were not subject to deduction or assessment." The rule thus prescribed was not limited to dividends declared and actually earned in 1862. No corporation declaring a dividend on the first day of September, 1862, out of earnings which had accumulated during a number of years preceding, would have been permitted to escape liability for the tax on that portion of the dividend which had been earned prior to the first day of January, 1862. When, by the passage of the act of June 30th, 1864, the tax on dividends was raised from three to five per cent., the commissioners of internal revenue, by circular dated July 1st, 1864, declared that "all dividends payable on and after July 1st, 1864, no matter when declared, are subject to the duty of five per centum;" and at page 68 of the second volume of the Internal Revenue Record will be found a decision of the Internal Revenue Department, dated August 22d, 1865, holding that all dividends declared since July 1st, 1864, were subject to the tax of five per centum, "without regard to the time when the profits, upon which such dividends are based, were declared."

FOURTH POINT.—*That the seventeenth section of the act of Congress, approved the fourteenth day of July, 1870, cannot have any bearing upon the decision of these causes.*

The seventeenth section of the act of July 14th, 1870, provides "That sections 120, 121, 122 and 123 of the act of June thirtieth, eighteen hundred and sixty-four, entitled 'An act to provide internal revenue to support the Government, to pay interest on the public debt and for other purposes,' as amended by the act of July thirteenth, eighteen hundred and sixty-six, and the act of March second, eighteen hundred and sixty-seven, shall be construed to impose the taxes therein mentioned to the first day of August, eighteen hundred and seventy, but after that date no further taxes shall be levied or assessed under said sections; and all acts or parts of acts relating to the taxes herein repealed, and that all the provisions of said acts shall continue in full force for levying and collecting all taxes properly assessed or liable to be assessed, or accruing under the provisions of former acts or drawbacks, the right to which has already accrued, or which may hereafter accrue under said acts, and for maintaining and continuing liens, fines, penalties and forfeitures incurred under or by virtue thereof. And this act shall not be construed to affect any act done, right accrued, or penalty incurred under former acts, but every such right is hereby saved; and for carrying out and completing all proceedings which have been already commenced, or that may be commenced, to enforce such fines, penalties and forfeitures or criminal proceedings under said acts, and for the punishment of crimes of which any party shall be or has been found guilty."

The Constitution of the United States provides that all *legislative* powers therein granted shall be vested in Congress, and that the *judicial power* of the United States shall be vested in the courts of the United States; and nothing can be plainer than that the construction of a statute, in its application to a cause pending in court, is a judicial and not a legislative function.

In Dash *vs.* Van Kleeck, 7 Johns, 477, the question before the court was as to the effect to be given to a statute of New York, (act of April 28th, 1810,) which provided that certain previous statutes should not "be so construed as to prevent any sheriff, coroner or other officer, in case of escape, from availing himself, as at common law, of a defence arising from a recapture or fresh pursuit, and a returning of the prisoner within the custody of such officer, before an action shall be commenced for the escape,"—the *construction* thus prescribed being at variance with previous judicial decisions, and the act prescribing it having been passed after the suit (an action against a sheriff for escape) had been brought. "As this act," said Kent, C. J., "was passed not only after the escape in question, but after suit brought, it cannot apply to and govern this case but in one of two ways: it must be considered either as creating a new rule for the government of the past case, or as declaring the interpretation of the former statutes for the direction of the courts.

"I think it can be shown that, upon principles of law and the Constitution, the act cannot be adjudged to operate in either of these points of view, and I should be unwilling to consider any act as so intended, unless that intention was made manifest by express words,—because it would be a violation of fundamental principles, which is never to be presumed.

"The act, according to a very natural and reasonable construction, is prospective, and applies only to escapes happening after the passing of it." Page 501.

"It is equally inadmissible," said the chief justice, after having shown that the act could not be considered as creating a new rule for past cases, "to consider the act as declaring how the former statutes were to be *construed* as to cases already existing. If this interpretation was to be considered as giving the former acts a new meaning, it then becomes a new rule, and is to have the same effect as any other newly-created statute. But if it be considered as an exposition of the former acts for the information and government of the courts in the decision of causes before them, it would then be taking cognizance of a judicial question. This could not *possibly* have been the meaning of the act, for the power that makes is not the power to construe the act. It is a well-settled axiom that the union of these two powers is tyranny.

"The legislature have no power to direct the judiciary in the interpretation of acts of Assembly previously passed, or to require it to change an interpretation already put upon them. Such a mandate is unconstitutional and void.

"An arbitrary interpretation by one legislative body of an act of Assembly passed by their predecessors, is not legal interpretation, but a substitution of the language and meaning of one for the other.

"An expository act of Assembly is destitute of retroactive force, because it is an act of judicial power and is in contravention of the ninth section of the ninth article of the Constitution."

Reiser *vs.* The William Tell Saving Fund Association, 3 Wright, Penna. Reports, 137.

In this case, Reiser *vs.* The Association, the question was as to the effect to be given to an act of Assembly declaring the true intent of former acts.

In Greenough *vs.* Greenough, 1 Jones, Pennsylvania Reports, 489, Chief Justice Gibson, when speaking of an act of the Legislature of Pennsylvania intended to validate wills to which the mark or cross of the testator had been affixed, a mode of execution which the courts had previously refused to recognize, said: "So far as regards wills consummated by the testator's death,—and this is one of them,—the act of 1848 is founded on no power known to the Constitution, but on the assumption of a power appropriated exclusively to the judiciary. Every tyro or sciolist knows that it is the province of the legislature to enact, of the judiciary to expound, and of the executive to enforce. * * * How this mandate to the courts to establish a particular interpretation of a particular statute can be taken for anything else than exercise of judicial power, in settling a question of interpretation, I know not."

"A mistaken opinion of the legislature concerning the law does not make the law." Marshall, C. J., Postmaster General *vs.* Early, 12 Wheaton, 148.

"If," said Mr. Justice Strong, in his opinion in this case, "the income tax imposed by the act of 1864 and its supplements expired with the 31st of December, 1869, except that the law provided for the collection of that portion of the tax on the income of 1869 which had not been paid; if the act of 1864 did not prescribe a tax upon dividends made and interest paid by railroad companies after December 31st, 1869, as I have endeavored to show, it was not the duty of these plaintiffs to pay to the district collector five per cent. of the dividend made by them and declared payable January 17th, 1870, and they had no authority to detain any portion of it from their stockholders. It was their right, as well as their duty, to pay over the entire dividend to the shareholders who had then acquired a vested right in it; and the plea of the defendants does not aver that the whole dividend was not at once thus paid over. Then the distress, which the plea attempts to justify, was made to enforce the performance of a duty that had no existence. It was substantially an attempt to enforce a penalty upon the plaintiffs for an omission to do that which they had no right to do,—a penalty equal to the amount of a five per cent. tax with an additional five per cent. thereon. It is to be remembered that the tax is levied upon the shareholders, and that the company is merely the Government agent to collect it. Its liability to a distress, if any there be, arose out of an unlawful failure to collect the tax and pay it over. But the failure was not unlawful at the time. Surely, it will not be maintained that the declaratory act of 1870 can be regarded as operating retrospectively to make the act or omission of the plaintiffs unlawful, and punishable as an offense, when the act or omission was innocent at the time when it occurred. Were it conceded that the construction given by Congress is binding in all cases where it would not disturb vested rights, or operate practically as an *ex post facto* law, it is not to be presumed it was intended for application to such a case as the present. Of course, I am not to be understood as maintaining that in July, 1870, when the declaratory act was passed, Congress had not power to impose a tax upon any income that had been received before that time. What I mean to say is, that it is not to be admitted Congress intended by that act to subject any institution to a penalty for not having, before its passage, collected a tax which had not been imposed."

But if it could be admitted that Congress possessed the power which, theoretically at least, is said to belong to the British Parliament, every principle of statutory construction would forbid the court to give a retrospective construction to the act of 1870.

The conduct of the past must stand acquitted or condemned, be lawful or unlawful, when judged by those rules, and those only which had an existence at the time the transaction took place. The future alone can be called upon to observe the dictates of every new rule. It has been very justly said, "To establish a rule by which a person should be required to shape his *past* conduct, would be to legistate an *absurdity*, to enact what would be an utter impossibility." Smiths Com. on Stat. and Const. Law, page 291.

Would it not be "an absurdity" to impute to Congress the intention of enacting in July, 1870, that a railroad company should *withhold* five per cent. from a dividend which had been paid six months previously? Can a law which was passed in

July have been meant to require a return to be made in the preceding month of February, and to impose a penalty for its not having been made in the month of February?

"Nothing short of the most indubitable phraseology will induce this court to hold that the legislature intended that these acts should have any other than a prospective operation." Dewart *vs.* Purdy, 5 Casey, 112.

In Thompson *vs.* Lack, 54 E. C. L. Repts., page 540, (3 M. G. S., 540,) where, to a plea of discharge under a bankrupt act, (5th and 6th Victoria, c. 116,) a demurrer was interposed that the plea did not show that the cause of action (covenant for arrears of an annuity accruing after the discharge, on an indenture executed before the proceedings in bankruptcy) was a *debt* contracted before the filing of the petition, *it was held*, that the cause of action was not a debt within the meaning of the 5th and 6th Vict. 116, and that the subsequent statute, 7th and 8th Vict., c. 96, which provided that any sum of money payable by way of annuity, &c., at any future time, "shall be deemed to be taken to be debts, within the meaning of the 5th and 6th Victoria," could not be construed retrospectively. "The general principle, however, that a statute is not to be construed so as to have a retrospective operation, is a just one," said Wilde, C. J., page 550, "for persons ought not to have their rights affected by laws passed subsequently. * * In order to give a retrospective effect to any statute, the words should be very clear."

In Marsh *vs.* Higgins, 9 Com. Bench, 550, (67 E. C. L. R., 551,) it was held that a statute which, if construed retrospectively, would have defeated an action properly brought, as the law stood before the passing of the act, could not be so construed, although it was impossible to deny that the language of the statute permitted such a construction. "It must have been well known to the legislature," said Chief Justice Wilde, "that strong and distinct words would be necessary to defeat a vested right to continue an action which has been well commenced; and we have carefully considered the act with a view to discover if it will bear such a construction as is contended for on the part of the defendants, but we are unable to arrive at any certain and satisfactory conclusion in the affirmative."

In Hitchcock *vs.* Way, 6 Ad. & Ellis, 943, 33 E. C. L. Reports, 249, it was held that a defence which, under the Stat., 9 Ann, c. 14, was fatal to an action by a *bona fide* holder on a bill of exchange given for a gaming consideration, was not taken away by the Stat. 5 and 6, William IV., c. 41, passed after the suit had been brought, although the latter act repealed the former so far as it made the bill void, and enacted that any bill which, but for the passage of the statute, would have been void, "*shall be deemed and taken* to have been made, drawn," &c., for "an *illegal* consideration" only.

When an offence was committed against the statute forbidding the removal of goods from demised premises to avoid the payment of rent, so that the landlord had a right to sue for the penalty imposed, before distress for rent was abolished by the act of 1846, held that the right of action was not taken away by the latter statute. Conley *vs.* Palmer, 2 Comstock, 182; S. C., 4 Denio, 374.

In Ogden *vs.* Blackledge, 2 Cranch, 272, an act of the State of North Carolina, declaring that, notwithstanding a former act, a still earlier act had not been repealed, was held inoperative as to cases then pending; and this court declined to hear an argument in support of the proposition that "to declare what the law is, or has been, is a judicial power; to declare what the law shall be, is legislative."

See, to the same effect, Bedford *vs.* Shilling, 4 S. & R., 401.

It would be easy to cite a great number of cases in support of the rule that nothing but absolute necessity can justify the courts in giving a retrospective operation to a statute; but it is believed to be unnecessary, since there is no maxim of the law more indisputably established.

In the valuable edition of Dwarris on Statutes, recently published by Judge Potter, of New York, will be found, at page 162, *et seq.*, a compendious discussion of the subject, with references to numerous authorities.

The act of 1870 is not rendered inoperative by being denied a retrospective effect. It can operate as an enactment of law for the future, and must be treated as so intended.

"It is true," said Chief Justice Marshall, in Postmaster General *vs.* Early, 12 Wheaton, 136, "that the language of the section indicates the opinion that jurisdiction existed in the Circuit Courts rather than an intention to give it; and a mistaken opinion of the legislature concerning the law does not make law.

"But if this mistake is manifested in words competent to make the law in the future, we know of no principle which can deny their effect. The legislature may pass a declaratory act, which, though inoperative in the past, may act in future."

To the same effect is the opinion of Chief Justice Kent in Dash *vs.* Van Kleeck, 7 Johns, 508.

Sam Hood,

JAMES E. GOWEN,
For Defendants ~~in~~ Error.

Buston

7th Section not quoted in his brief—

Judge D

In the Supreme Court of the United States.

No. 339.

WILLIAM H. BARNES AND JAMES N. KERNS,

PLAINTIFFS IN ERROR,

vs.

THE PHILADELPHIA & TRENTON RAILROAD CO.

DEFENDANTS IN ERROR.

ARGUMENT FOR DEFENDANTS IN ERROR.

Chapman Biddle
Theo: Cuyler

~~A. I. FISH,~~
~~WM. HENRY RAWLE.~~

The Leisenring Steam Printing House, 237 and 239 Dock Street, Philadelphia.

In the Supreme Court of the United States.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Willliam H. Barnes and James N. Kerns, Plaintiffs in Error,

vs.

The Philadelphia and Trenton Railroad Company, Defendants in Error.

December, 1870.
No. 339.

ABSTRACT OF THE CASE.

This is an action of trespass *vi et armis* (commenced in the Supreme Court of Pennsylvania for the Eastern District, and removed by a writ of certiorari to the Circuit Court of the United States in and for the Eastern District of Pennsylvania) against William H. Barnes and James N. Kerns, (the plaintiffs in error,) to recover damages for an unlawful distress of certain goods and chattels of the railroad company (the defendants in error).

To the declaration filed, the defendants pleaded—

First.—Not guilty, (which plea was afterwards, by leave of the Court, withdrawn,) and

Second.—That they did distrain the goods and chattels in the declaration mentioned, but averred, in justification thereof, that the defendant Barnes was, at the time, the collector of internal revenue of the United States for the first collection district of Pennsylvania. That the defendant Kerns was, at the same time, the deputy collector thereof for the same district; that the railroad company had, on the nineteenth day of January, 1870, declared a semi-annual dividend of five per centum in money on the capital stock of the said company, payable on and after the first day of February, 1870, amounting to $66,268.42, as part of their net earnings, profits, income, and gains made and accrued between the first day of July, 1869, and the thirty-first day of December, 1869; that after the payment of the said dividend there remained in the hands of the company a surplus of the said profits, income, and gains amounting to $80,708.43, which was set apart for certain necessary constructions and repairs. That a tax of five per centum on the amount of the said dividend and surplus, to wit, the sum of $7,348.84, was duly assessed against the company, and became due and payable to the United States on or before the last day of March, 1870. That the defendant Barnes, collector as aforesaid, notified the railroad company that the tax so assessed was due and payable on or before the said last day of March, 1870, and that, unless the same should be paid on or before that day, it would become his duty to collect the same, together with a penalty of five per centum additional thereto, and interest at the rate of one per centum per month from the time when the said tax was due and payable.

That the tax was not paid to the said Barnes, collector as aforesaid, on or before the said last day of March, 1870; whereupon, afterwards, the said Barnes, collector as aforesaid, on the 21st of April, 1870, demanded payment thereof, with five per centum additional and such interest as might accrue before payment, and notified the railroad company that if the said tax, penalty, and interest should not be paid within ten days from the time of the said demand, he would make distraint therefor as provided by law; that notwithstanding the said notice and demand, the said tax, penalty, and interest were, on the fourth day of May, 1870, due and unpaid by the company; wherefore the said Barnes, collector as aforesaid, and the said Kerns, deputy collector as aforesaid, by his command, did seize and distrain the said goods and chattels as and for a distress for the said tax, penalty, and interest.

The plaintiffs below demurred to the said second plea, but before judgment on their demurrer was entered, Congress passed the act approved July 14th, 1870, entitled "An act to reduce internal taxes and for other purposes." The court subsequently sustained their demurrer, upon which a writ of inquiry of damages was issued and judgment entered in favor of the company and against the said Barnes and the said Kerns for the amount assessed by the jury, with costs, &c.

The assignment of error is the judgment given for the defendants in error (the plaintiffs below) against the plaintiffs in error (the defendants below).

ARGUMENT FOR DEFENDANTS IN ERROR.

This case was argued in the court below at the same time as the cases of the Philadelphia and Reading Railroad *vs.* Barnes, and the Harrisburg and Lancaster Railroad Company *vs.* Barnes, which are numbered respectively 334 and 338 on this calendar. In addition to the brief for those defendants in error, to which this defendant in error craves leave to refer as part hereof, the latter has only the following suggestions to make:—

This case is free from all difficulty as to the question of *interest* paid by this defendant in error after January 1st, 1870. The pleadings raise only the question as to dividends to stockholders, declared in January and payable in February, 1870, as part of the "net earnings, profits, income, and gains made and accrued" between July 1st, 1869, and January 1st, 1870, and as to the surplus of the said profits set apart in January, 1870, for certain constructions and repairs.

The questions are:—

I. As to the duration of the tax.

(*a.*) Under sections 116, 117, and 119 of the act of June 30th, 1864, as amended by acts of 13th July, 1866, and 2d March, 1867.

(*b.*) Under section 122, as amended by the act of 13th July, 1866.

II. Whether dividends paid, or surplus profits invested, in 1870, out of the earnings of 1869, are to be considered as income of 1869 or 1870.

III. As to the retrospective effect of section 17 of the act of 1870.

I. As to the duration of the tax.

(*a.*) Under sections 116, 117, and 119 of act of June 30th, 1864, as amended by act of 13th July, 1866, and 2d March, 1867.

The first income-tax law was the act of August 5th, 1861, (12 U. S. Statutes at Large, 309,) the 49th section of which provided:—

"That from and after the first day of January next, there shall be levied, collected and paid, upon the annual income of every person residing in the United States, whether such income is derived from any kind of property, or from any profession, trade, employment, or vocation, carried on in the United States or elsewhere, or from any other source whatever, if such annual income exceeds the sum of eight hundred dollars, a tax of three per centum on the amount of such excess of such income above eight hundred dollars: *Provided*, That upon such portion of said income as shall be derived from interest upon treasury notes, or other securities of the United States, there shall be levied, collected, and paid, a tax of one and one-half per centum. Upon the income, rents, or dividends accruing upon any property, securities, or stocks owned in the United States by any citizen of the United States residing abroad, there shall be levied, collected, and paid a tax of five per centum, excepting that portion of said income derived from interest on treasury notes, and other securities of the Government of the United States, which shall pay one and one-half per centum. The tax herein provided shall be assessed upon the annual income of the persons hereinafter named for the year next preceding the time for assessing said tax, to wit, the year next preceding the first of January, eighteen hundred and sixty-two; and the said taxes, when so assessed and made public, shall become a lien on the property or other sources of said income for the amount of the same, with the interest and other expenses of collection, until paid."

The second income-tax law was the act of July 1st, 1862. (12 U. S. Statutes at Large, 473.)

The 89th section of this act repealed the 49th section of the act of 1861. The 90th section provided:—

"That there shall be levied, collected, and paid annually, upon the annual gains, profits, or income of every person residing in the United States, whether derived from any kind of property, rents, interest, dividends, salaries, or from any profession, trade, employment, or vocation, carried on in the United States or elsewhere, or from any other source whatever, except as hereinafter mentioned, if such annual gains, profits, or income exceed the sum of six hundred dollars, and do not exceed the sum of ten thousand dollars, a duty of three per centum on the amount of such annual gains, profits, or income, over and above the said sum of six hundred dollars; if said income exceeds the sum of ten thousand dollars, a duty of five per centum upon the amount thereof exceeding six hundred dollars; and upon the annual gains, profits, or income, rents and dividends accruing upon any property, securities, and stocks owned in the United States by any citizen of the United States residing abroad, except as hereinafter mentioned, and not in the employment of the Government of the United States, there shall be levied, collected, and paid a duty of five per centum."

And section 91 provided:—

"The duty herein provided for shall be assessed and collected upon the income for the year ending the thirty-first day of December next preceding the time for levying and collecting said duty; that is to say, on the first day of May, eighteen hundred and sixty-three, and in each year hereafter."

And by the 92d section it was provided that the duties on incomes herein imposed shall be due and payable on or before the thirtieth day of June, in the year 1863, and in each year thereafter until and including the year 1866, *and no longer*.

Then came the third income-tax law, viz.:—The act of 30th of June, 1864, (13 Statutes at Large, 281,) which forms the basis of the present internal revenue system.

The 173d section of this act repealed the above act of 1862.

The 116th section imposed a tax of 5 per cent. on the gains, profits, and income of every person residing within the United States, or citizens residing abroad, derived from any source, excepting corporation and United States official income; which tax was to be assessed, collected, and paid upon the gains, profits, or income for the year ending the thirty-first day of December next preceding the time for levying, collecting, and paying said duty.

The 119th section provided:—

"That the duties on incomes herein imposed shall be levied on the first day of May, and be due and payable on or before the thirtieth day of June, in each year, until and including the year eighteen hundred and seventy, *and no longer*.

The 120th and 121st sections imposed a tax on dividends payable by banks, insurance companies, &c.

The 122d section imposed a tax on dividends and interest payable by railroad companies, &c. (This section is noticed more fully, *infra*, page 9.)

The 123d section imposed a tax on the salaries of persons in the service of the United States.

The fourth income-tax law was the act of March 3d, 1865, (13 U. S. Statutes at Large, 479,) which amended the 116th section of the act of June 30th, 1864, by striking out all after the enacting clause and inserting the following:—

"There shall be levied, collected, and paid annually upon the annual gains, profits, and income of every person residing in the United States, or of any citizen of the United States residing abroad, whether derived from any kind of property, rents, interest, dividends, or salaries, or from any profession, trade, employment, or vocation carried on in the United States or elsewhere, or from any other source whatever, a duty of five per centum on the excess of over six hundred dollars and not exceeding five thousand dollars, and a duty of ten per centum on the excess over five thousand dollars; and in ascertaining the income of any person liable to an income tax, the amount of income received from institutions whose officers, as required by law, withhold a per centum of the dividends made by such institutions and pay the same to the Commissioner of Internal Revenue, or other officer authorized to receive the same, shall be included; and the amount so withheld shall be deducted from the tax which otherwise would be assessed on such persons; and the duty herein provided for shall be assessed, collected, and paid upon the gains, profits, and income for the year ending the thirty-first day of December next preceding the time for levying, collecting, and paying said duty."

It left unaltered the 119th section of the act of 1864.

The fifth income-tax law was the act of 13th July, 1866. (14 U. S. Statutes at Large, 138.)

The 9th section amended the 119th section of the act of 1864, by striking out all after the enacting clause, and inserting, in lieu thereof, the following:—

"The taxes on incomes herein imposed, shall be levied on the first day of May, and be due and payable on or before the thirtieth day of June, in each year, until and including the year eighteen hundred and seventy, *and no longer;* and to any sums annually due and unpaid after the 30th of June, as aforesaid, and for ten days after notice and demand thereof by the collector, there shall be levied, in addition thereto, the sum of ten per centum on the amount of duties unpaid, as a penalty, except from the estates of deceased or insolvent persons."

This 9th section also amended sections 120 and 122 of the act of 1864, by providing that the tax should be paid by all holders, *aliens* or otherwise. The latter clause was inserted to meet the decision of this court, which had decided in The Northern Central Railroad *vs.* Jackson, that, under the act of June 30th, 1864, the income-tax was not imposed on non-resident aliens.

The sixth income-tax law was the act of March 2d, 1867. (14 U. S. Statutes at Large, 480.)

The 113th section still further amended the 119th section of the act of 1864, by providing:—

"The taxes on incomes herein imposed shall be levied on the first day of March, and be due and payable on or before the thirtieth day of April, in each year, until and including the year eighteen hundred and seventy, *and no longer;*" and further provided:—

"That the tax on incomes for the year 1866 shall be levied on the day this takes effect."

It left unaltered the amended sections 120, 121, and 122 of the act of 1864, and it amended section 123 as to persons in the service of the United States, which is immaterial on this point, though important under another head of this argument.

These (with the exception of the act of July 14th, 1870, which will be noticed hereinafter) are all the statutes which bear upon the case,—and they show clearly the *duration* of the tax. The tax is imposed and is collected on all incomes received up to December 31st, 1869, and is levied in March for the preceding year. Thus it was levied

In 1862 for 1861, for the act of August 5th, 1861, so provides.*
" 1863 " 1862, " July 1st, 1862, "
" 1864 " 1863, " " "
" 1865 " 1864, " June 30th, 1864, "
" 1866 " 1865, " " "
" 1867 " 1866, " July 13th, 1866, "
" 1868 " 1867, " March 2d, 1867, "
" 1869 " 1868, " " "
" 1870 " 1869, " " "

And this is reasonable, for no one can, in March, 1870, know what his income for the whole of that year will be.

Such, too, was the practical construction given to these statutes from the beginning, and the community paid, in 1863, a tax on all money received as income in 1862, including that due January 1st, 1862.

(*b*.) But under section 122 of the act of 1864, as amended by the act of 1866, it is argued, on the part of the plaintiffs in error, that the tax on dividends of corporations directed to be levied by the 122d section is a distinct and independent tax, in no way connected with, or dependent upon, the continuance of the income tax for its existence.

The 122d section of the act of 1864 was amended by the 9th section of the act of July 13th, 1866, so as to read as follows:—

"Any railroad, canal, turnpike, canal navigation, or slackwater company, indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip or money due or payable to its stockholders, including non-residents, whether citizens or aliens, as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a tax of five per centum on the amount of all such interest or coupons, dividends or profits, whenever and wherever the same shall be payable, and to whatsoever party or person the same may be payable, including non-residents, whether citizens or aliens; and said companies are hereby authorized to deduct and withhold from all payments on account of any interest, or coupons, and dividends, due and payable as aforesaid, the tax of five per centum; and of the amount of said tax so deducted from the interest, or coupons, or dividends, and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend, or interest, or coupon on the bonds, or other evidences of their indebtedness, so held by any person or party whatever, except where said companies have contracted otherwise; and a list or return shall be made and rendered to the assessor or assistant assessor on or before the tenth day of the month following that on which said interest, coupons, or dividends become due and payable, and as often as every six months; and said list or return shall contain a true and faithful account of the amount of tax, and there shall be annexed thereto a declaration of the president or treasurer of the company, under oath or affirmation, in form and manner as may be prescribed by the Commissioner of Internal Revenue, that the same contains a true and faithful account of said tax. And for any default in making or rendering such list or return, with the declaration annexed, or of the payment of the tax as aforesaid, the company making such default shall forfeit as a penalty the sum of one thousand dollars; and in case of any default in making or rendering said list or return, or of the payment of the tax or any part thereof, as aforesaid, the assessment and collection of the tax and penalty shall be made according to the provisions of law in other cases of neglect or refusal."

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* In point of fact, no income tax whatever was levied for the year 1861.

The object of the income-tax law was, as has been shown in the other briefs in these cases, to impose a tax on the gains or income of every person.

The 116th section of the act of 1864 taxes income "derived from any kind of property or from any source whatever," excepting corporation and United States official income, and requires the tax-payer to make a return of all such income; but then the 117th section allows a deduction to be made for all national, state, and municipal taxes, *and also* deducts "the income derived from dividends on shares of stock and interest on bonds," and United States official income.

The reason for this was, not that such corporation and official income should escape taxation, but because the Government could more readily grasp it from the corporations and official disbursing officers than from the tax-payers individually. Consequently, the 120th, 121st, 122d, and 123d sections of the act of 1864 thus provided a mode of collecting the tax from corporations, viz.:—That derived from insurance companies, (§120,) banks, (§121,) railroads, canals, turnpikes, canal navigation, or slackwater companies, (§122,) and United States officers, civil, military, naval, or otherwise (§123); and the officers of these corporations on the one hand, and the United States paymasters and disbursing officers on the other, were authorized to retain the tax from the income, and themselves return and pay it to the Government. Hence, the Government collected the income tax in two ways, viz.:—Upon what may be termed *general income*, (such as rents, interest on mortgages, &c.,) the tax-payer himself returned and paid the tax; upon certain *corporation* and *official* income it was returned and paid by the officers of the corporation or of the Government.

Therefore, sections 116 and 122 of the act of 1864 are in *pari materia*, and are to be construed together. This cannot be more forcibly stated than was done by the court below:—

"There is nothing to warrant the belief that Congress intended to impose a burden upon income derived from one species of property greater or longer continued than that imposed upon income from other property, or that they intended to discriminate against federal officers, and compel them to pay a tax on their salaries after taxes on all other salaries had ceased. The dividends received by a shareholder of a railroad company, or a canal, turnpike, or slackwater navigation company, or of a banking, trust, or insurance company, are, in every sense, as much his income as are the dividends he may receive from any other company: for example, a bridge or manufacturing corporation. So is the interest received for loans to a railroad company as truly income of the bondholder as is the interest received by him on permanent loans to any other corporation or to natural persons. Was it the intention of Congress to enact that one who lent his money to a telegraph company, or to a mining or manufacturing company, should be exempt from a tax upon his interest after December 31st, 1869, but that one who lent to a canal or railroad company should continue to pay the tax indefinitely and for all time? Is such a reasonable construction of the act of 1864?

"And again: the salary of an officer of the United States is his income as certainly as is the salary received by another from a corporation is his. Was it destined to tax one and exempt the other? To my mind, the act shows no intent to make such discriminations. I must regard the 120th, 121st, 122d, and 123d sections, not as imposing a distinct tax upon the subjects mentioned in them, but as having only the purpose to prescribe a peculiar mode of securing the collection of a portion of the tax previously imposed by the 116th section."

Such, moreover, was in effect the decision of this court in The Northern Central Railroad *vs.* Jackson, 7 Wallace, 262, in which case it was held that, as the income tax was not payable under the 116th section by non-resident aliens, it could not be deducted by corporations whose bonds or shares were held by such aliens.

So much for the argument as to the *duration* of the tax.

II. Whether dividends paid or surplus profits invested in 1870, out of the earnings of 1869, are to be treated as income of 1869 or 1870?

As to this, there would have been no reason to complain of the hardship of considering dividends paid in 1870 as income of 1869 had this theory been adopted by the internal revenue office when the income-tax law was first enforced, whatever might have been thought of its correctness in the abstract; but, as has been shown, (*ante*, page 9,) dividends payable on and after January 1st, 1862, were held to be income for 1862, although they might have represented earnings for preceding years, and the practical effect of the doctrine contended for by the Government is to tax the income of eighteen months as the receipts of one year.

The time when the dividend is payable, or the surplus invested, (by being carried to construction account or otherwise,) must necessarily be the time when its liability to taxation attaches. In the case of dividends, they then, and not before, become the divisible income of the stockholders for that year; and in the case of surplus, it then, and not before, becomes the indivisible income of the stockholders, and before either of these do thus become income, the liability to taxation does not attach. (See, as to this, the decision of the Internal Revenue Department of August 22d, 1865, cited in defendants' brief in the case of Barnes *vs.* Philadelphia and Reading Railroad Company, page 12.)

Thus, as was said in the court below, "the duty arises when the dividend is payable, and such is the construction that has been given to the act, in accordance with which the taxes have been collected. Prior to the act of 1864, there was a tax on dividends at the rate of three per centum, and when, by that act, the rate was raised to five per centum, the Commissioner of Internal Revenue issued a circular, dated July 1st, 1864, declaring that 'all dividends payable on and after July 1st, 1864, no matter when declared, are subject to the duty of five per centum.' I am not aware that any different construction of the act has ever prevailed. My opinion, therefore, is, that the dividend declared by the plaintiffs must be regarded as income of the stockholders for the year in which it was payable."

III. As to the retrospective effect of section 17th of the act of 1870.

As to this, these defendants in error have nothing to add to the brief of the other defendants in error and to the opinion of the court below.

Chapman Biddle
Theo Cuyler
~~A. J. FISH~~,
~~WM. HENRY RAWLE~~,
For Defendants in Error.

[illegible]

SUPREME COURT OF THE UNITED STATES.

NO. 338.

WILLIAM H. BARNES and JAS. N. KERNS,
Plaintiffs in Error,

VS.

The HARRISBURG, PORTSMOUTH, MOUNT JOY and LANCASTER RAILROAD COMPANY.

BRIEF OF THE DEFENDANTS IN ERROR.

CHAPMAN BIDDLE,
THEODORE CUYLER,
for Defendants in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

WILLIAM H. BARNES and JAMES N. KERNS, Plaintiffs in Error, *vs.* The HARRISBURG, PORTSMOUTH, MOUNT JOY and LANCASTER RAILROAD CO., Defendants in Error.	*December, 1870.* *No. 338.* *Error to the Circuit Court of the U. S. for the Eastern District of Pennsylvania.*

ABSTRACT OF THE CASE.

This is an action of Trespass *vi et armis* [commenced in the Supreme Court of Pennsylvania for the Eastern District, and removed by a writ of certiorari to the Circuit Court of the United States in and for the Eastern District of Pennsylvania], against William H. Barnes and James N. Kerns, (the plaintiffs in Error), to recover damages for an unlawful distress of certain goods and chattels of the Railroad Company (the defendants in Error).

To the declaration filed the defendants pleaded:

1st. Not Guilty, (which plea was afterwards, by leave of the Court, withdrawn), and

2nd. That they did distrain the goods and chattels in the declaration mentioned, but averred in justification thereof that the defendant Barnes was, at the time, the Collector of Internal Revenue of the United States for the First Collection District of Pennsylvania. That the defendant Kerns was at the same time the Deputy Collector thereof for the same District; that the Railroad Company had on the 10th day of January, 1870, declared a dividend on their capital stock, payable on and after that date, amounting to $43,567.63 as part of their income and gains made and accrued between the first day of July, 1869, and the first day of January, 1870; that the Company were, and for a long time had been indebted in the sum of $700,000 for which they had issued their bonds, bearing interest at six per cent. per annum, and that upon the first day of January, 1870, the sum of $21,000 computed in legal tender Treasury Notes of the United States, fell due, and was payable by them as, and for the semi-annual interest of the said bonds for the preceding six months. That a tax of five per centum on the amount of the said dividend and interest, to wit: the sum of $3,228.38 was duly assessed against the Company, and became due and payable to the United States on or before the last day of March, 1870. That the defendant Barnes, Collector as aforesaid, notified the Railroad Company that the Tax so assessed was due and payable on or before the said last day of March, 1870, and that unless the same should be paid on or before that day, it would become his duty to collect the same, together with a penalty of five per centum additional thereto, and interest at the rate of one per centum per month, from the time when the said tax was due and payable.

That the tax was not paid to the said Barnes, Collector as aforesaid, on or before the said last day of March, 1870, Whereupon afterwards the said Barnes, Collector, as aforesaid, on the 21st of April, 1870, demanded payment thereof with five per centum additional and such interest as might accrue before payment, and notified the Railroad Company that if the said tax, penalty and interest should not be paid within ten days from the time of the said demand, he would make distraint therefor as provided by law—that notwithstanding the said notice and demand, the said tax, penalty and interest were on the 4th day of May, 1870, due and unpaid by the

Company; wherefore the said Barnes, Collector as aforesaid, and the said Kerns, Deputy Collector as aforesaid, by his command, did seize and distrain the said goods and chattels as and for a distress for the said tax, penalty and interest.

The plaintiffs below demurred to the said second plea, but before judgment on their demurrer was entered, Congress passed the act approved July 14th, 1870, entitled "An Act to reduce internal taxes and for other purposes." The Court subsequently sustained their demurrer, upon which a writ of inquiry of damages was issued and judgment entered in favor of the Company and against the said Barnes and the said Kerns for the amount assessed by the jury, with costs, &c.

The assignment of error is the judgment given for the defendants in error (the plaintiffs below) against the plaintiffs in error (the defendants below).

ARGUMENT

FOR THE

DEFENDANTS IN ERROR.

The question involved in this case is, whether railroad companies are or are not liable to pay a tax of five per centum to the United States on dividends declared by them after the 1st of January, 1870 and upon interest falling due and becoming payable by them on that day.

The claim to the tax is asserted by the United States by virtue of several acts of Congress, known as the Internal Revenue acts; to wit: the

Act of 30th June, 1864, (13 Stat. at Large, 223)
Act of 3d March, 1865, (13 Stat. at Large, 469)
Act of 13th July, 1866, (14 Stat. at Large, 98)
Act of 2d March, 1867, (14 Stat. at Large, 471)

FIRST. *The Act of 30th June, 1864, and the supplements thereto, considered with reference to the tax upon Incomes.*

Congress, in enacting the laws enumerated above, intended to establish a uniform system of taxation, by which, among other objects, internal revenue might be raised for the support of the government and the payment of the interest on the public or funded debt.

To promote these ends, three general classes of taxes were imposed, to wit:

EXCISE,
LICENSE, and
STAMP.

And to insure the prompt and efficient collection of the revenue anticipated from these sources, machinery, somewhat complex in its nature, was at the same time created.

The tax upon Incomes.

Of the three general classes of taxes imposed by the law, the Excise is the only one affecting the present question, and that because a portion of it was expressly charged upon incomes. In the general language of the Statutes, all sources of income were rendered liable to the payment of this tax or duty. The 116th section of the act of 1864, as amended by the act of 1865, provides as follows:

> "That there shall be levied, collected and paid annually upon the annual gains, profits and income of every person residing in the United States, or of any citizen of the United States residing abroad, whether derived from any kind of property, rents, *interests*, *dividends*, or salaries, or from any profession, trade, employment or vocation carried on in the United States, or elsewhere, *or from any other source whatever*, a duty of five per centum on the excess over $600, and not exceeding $5,000, and a duty of ten per cent. on the excess over $5,000. And in ascertaining the income of any person liable to an income tax, the amount of income received from institutions whose officers, as required by law, withhold a per centum of the dividends made by such institutions and pay the same to the Commissioner of Internal Revenue or other officer authorized to receive the same, shall be included; and the amount so withheld shall be deducted from the tax which otherwise would be assessed upon such person. And the duty herein provided for shall be assessed, collected and paid upon the gains, profits and income for the year ending the thirty-first day of December next preceding the time for levying, collecting and paying said duty."

The 119th section of the act of 1864, as supplied by the 9th section of the act of 1866, provides—

> "That the taxes on incomes herein imposed shall be levied on the first day of May, and be due and payable on or before the thirtieth day of June in each year, *until and including the year* 1870, *and no longer.*"

By the 13th Section of the Act of 1867, the 116th Section, as further amended by the Act of 1866, was stricken out and in lieu of it, the following was enacted:

"That there shall be levied, collected and paid annually on the gains, profits and income of any person residing in the United States, or of any citizen of the United States residing abroad, whether derived from any kind of property, rents, *interests, dividends* or salaries, or from any profession, trade, employment or vocation carried on in the United States or elsewhere, *or from any other source whatever*, a tax of five per centum on the amount derived over one thousand dollars, and a like tax shall be levied, collected and paid annually upon the gains, profits and income of every business, trade or profession carried on in the United States, by persons residing without the United States and not citizens thereof.

"And the tax herein provided for shall be assessed, collected and paid on the gains, profits and income for the year ending the 31st day of December next preceding the time for levying, collecting and paying the said tax."

By the same 13th Section of the Act of 1867, the 119th Section of the Act of 1864, as amended by the subsequent acts, was again amended by striking out all after the enacting clause, and inserting in lieu thereof, the following:

"That the taxes on incomes herein imposed, shall be levied on the 1st day of March, and be due and payable on or before the 30th day of April, in each year, *until and including the year* 1870, *and no longer;* and to any sum due and unpaid after the 30th day of April, as aforesaid, and for ten days after notice and demand thereof by the collector, then shall be levied in addition thereto, the amount of five per centum on the amount of taxes unpaid, and interest at the rate of one per centum per month upon said tax from the time the same became due, as a penalty, except from the estates of deceased, insane or insolvent persons. *Provided*, that the tax on incomes for the year 1866, shall be levied on the day this takes effect."

The 122d Section of the Act of 1864, is in the following words:

"That any *railroad*, canal, turnpike, canal navigation or slack-water company, indebted for any money, for which bonds or other evidences of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip or money, due or payable to its stockholders, as part of the earnings, profits, income or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a duty of five per centum on the amount of all such interest, or coupons, dividends or profits, whenever the same shall be payable, and said companies are hereby authorized to deduct and withhold from all payments, on account of any interest, or coupons and dividends due and payable as aforesaid, the duty of five per centum; and the payment of the amount of said duty so deducted from the interest or coupons or dividends, and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend, or interest, or coupon on the bonds, or other evidences of their indebtedness so held by any person or party whatever, except where said companies may have contracted otherwise. And a list or return shall be made and rendered to the assessor or assistant assessor in duplicate, and one of said lists or returns shall be transmitted and the duty paid to the Commissioner of Internal Revenue within thirty days after the time when the said interest, coupons or dividends become due and payable, and as often as every six months, and said list or return shall contain a true and faithful account of the amount of the duty, and there shall be annexed thereto a declaration of the president or treasurer of the company, under oath or affirmation, in form and manner as may be prescribed by the Commissioner of Internal Revenue, that the same contains a true and faithful account of said duty, and for any default in making or rendering such list or return, with the declaration annexed, or of the payment of the duty as aforesaid, the company making such default shall forfeit as a penalty the sum of one thousand dollars, and in case of any default in making or rendering said list or return, or of the payment of the duty, or any part thereof, as aforesaid, the assessment and collection of the duty and penalty shall be made according to the provisions of law in other cases of neglect or refusal."

This section was supplied by the 9th Section of the Act of 1866.

The clauses substituted for it are in the following words:

"That any *railroad*, canal, turnpike, canal navigation or slack-water company, indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest on any such company that may have declared any dividend in scrip or money due or payable to its stockholders (including non-residents, whether citizens or aliens), as part of the earnings, profits, income or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a tax of five per centum on the amount of all such interest or coupons, dividends or profits, whenever and wherever the same shall be payable, and to whatsoever party or person the same may be payable, including non-residents, whether citizens or aliens; and said companies are hereby authorized to deduct and withhold from all payments on account of any interest or coupons and dividends due and payable as aforesaid, the tax of five per centum; and the payment of the amount of said tax, so deducted from the interest or coupons or dividends, and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend, or interest, or coupon on the bonds or other evidences of their indebtedness so held by any person or party whatever, except where said companies may have contracted otherwise. And a list or return shall be made and returned to the assessor or assistant assessor, on or before the tenth day of the month following that in which said interest, coupons or dividends become due and payable, and as often as every six months; and said list or return shall contain a true and faithful account of the amount of tax, and there shall be annexed thereto a declaration of the president or treasurer of the company, under oath or affirmation in form and manner as may be prescribed by the Commissioner of Internal Revenue, that the same contains a true and faithful account of said tax. And for any default in making or rendering such list or return, with the declaration annexed, or of the payment of the tax as aforesaid, the company making such default shall forfeit as a penalty the sum of one thousand dollars; and in case of any default in making or rendering said list or return, or of the payment of the tax or any part thereof, as aforesaid, the assessment and collection of the tax and penalty shall be made according to the provisions of law in other cases of neglect or refusal."

1. Extent of the tax:

The law both of 1864 and 1867, subjected the gains, profits and income of all residents of the United States and of all citizens of the United States residing abroad, derived from *any source whatever*, including by its express terms, *interests and dividends*, to a tax of five per centum over, or beyond, a specified amount.

2. Mode of collection,

The government resorted to two general ways of collecting its income tax:

A.—By requiring the tax-payer himself to pay the tax upon the whole of his annual gains, profits and income, except those derived from the sources hereinafter mentioned.

B.—By requiring the tax to be deducted from that part of the income derived from dividends declared by insurance companies, banks, railroads, canals, turnpikes, canal navigation and slack-water companies, &c., and from interest on indebtedness due by railroads, canals, &c., by the several companies, and paid to the collector of the proper district,—and also by requiring United States paymasters and disbursing officers to withhold the aforesaid tax from the salaries of officers in the civil, military, naval, or other service of the United States.

An attempt was made in the case of Jackson *vs.* the Northern Central Railway Co., 7 Wallace 262, to separate the tax upon incomes into two distinct parts—one part into what might be termed a tax upon the *person* and the other, by way of contradistinction, upon the *thing*. The provisions of the law in regard to the former are alleged to be found exclusively in the 116th section, and to the latter in the 120th, 121st, 122d and 123d sections of the Act of 1864. If, however, the whole of these sections, to wit, the 116th, 120th, 121st, 122d and 123d, when grouped together, do not form an entire and complete system for levying and collecting the tax upon incomes of persons derived from any source whatever, then the 116th creates one system, and the other sections create another and a necessarily independent one. But that this effort was not warranted is settled by the decision in that case; the ground of that decision being, that the tax collectable under the 122d section was that imposed by the 116th section, and that a reasonable construction of the several provisions of the act did not indicate an intent on the part "of Congress to impose an income tax on non-resident aliens; that they were not only not included in the description of persons upon whom the tax was imposed, but were impliedly excluded by confining it to residents of the United States and citizens residing abroad [and as remarked by Mr. Justice Strong, in his opinion in the case of the Philadelphia and Reading Railroad Co. *vs.* Barnes, "an exclusion only found in the 116th section"], and that the deduction from the prescribed income of the interest on these railroad bonds, when paid by the companies, was regarded as simply a mode of collecting this part of the income tax."

The act of 1864, as amended by the act of 1865, imposed the tax of 5 per centum on the *excess over* $600, and not exceeding $5,000 and a tax of 10 per centum on the excess over $5,000; but under both acts, in ascertaining the income of any person liable to an income tax, the amount of income received from institutions whose officers, as required by law, withheld the tax, was to be included, and the tax so withheld was directed to be deducted from the tax which otherwise would be assessed upon such *person*. The act of 1867 increased the exemption to $1,000, and imposed a uniform rate of 5 per centum.

The practice of the government has, until the passage of the Act of 1870, conformed to the laws of 1865 and 1866, in ascertaining taxable income. The reason of the earlier laws is obvious, for by introducing the amount of "income received from institutions," &c., into the general return, the *person* liable to an income tax might be made to pay on a portion of his aggregate income the maximum rate of 10 per centum, while his other or general gains, profits and income might be between the limits of $600 and $5,000. The tax of five per centum which the railroad and other corporations were directed to retain from dividends, &c., was not therefore always the whole of the tax to which the owner might be liable, before the act of 1867, on that class of income.

3. Time of assessing, and duration of, the tax.

By the final change of the law in 1867 the tax is to be levied on the 1st of March, and become due and payable on or before the 30th of April in the year succeeding that for which the return of the income is to be made. It seems to be beyond question that if the income of the year ending the 31st of December next preceding the levying of the same is to be returned, that the assessment of the tax must always be made in the succeeding year, and of course at the time prescribed by the act. This statement, therefore, shows the meaning, if there can or ought to be any reasonable doubt on the subject, of the 13th section of the act of 1867, in providing that the taxes on incomes shall be levied on the 1st of March, "until and including the year 1870, and no longer." The income tax may be assumed then to have expired with its assessment upon the gains, profits and income for the year ending the 31st of December, 1869.

4. Annual income.

What is annual income within the meaning of the law? Annual income is conceded to be the subject of the tax. But is that the income "derived" annually from rents, *interest*, *dividends*, &c., and from all sources whatever, or is it something more and beyond? To most minds the words annual income convey the idea expressed by the language of the law, income derived annually—that is, income earned, produced and received, or, which at all events, might be collected during the year; so that when the government first collected its tax it is to be presumed that it collected it on all the income, earned, produced and received, or which might have been received, during the preceding year, ending on the 31st day of December. And this collection process, it is also to be presumed, was repeated by the government year after year, until, and including the year 1870. When, therefore, the tax-payer returned in 1870 all the income he had received or was lawfully entitled to receive in the year 1869, he had made a full return of his annual gains, profits and income "derived" in that year. If he was the owner of railroad stock and bonds upon which dividends had been declared payable, or interest paid during the year 1869, the tax upon which had been withheld, as required by law, he had thereby paid his tax for the year 1869, as to that part of his taxable property. Interest on the bonded debt of railroad companies is ordinarily payable semi-annually; there would therefore be but two payments of it in each year, where it is made payable semi-annually, and if the tax is withheld upon those two payments, it is the tax upon the whole annual interest. It has been contended, however, that interest payable on the new year is interest earned during the six months prior, and therefore forms part of the annual income of the preceding year. There are several answers to such a position: first, it is not earned in legal contemplation until it becomes a legal demand, second, it would be a wrong upon the tax-payer to deduct in 1869 the tax for two semi-annual payments, and in 1870 retain the tax on the ground that the interest was previously earned, because three semi-annual payments could not possibly be earned in any one year; third, the act refers only to income "derived," &c., in the year ending the 31st of December preceding, and fourth, the amount if withheld could not be deducted from any income tax, as required by section 116, because by the very terms of the act taxes on incomes are only to be levied "until and including the year 1870, and no longer."

It is submitted, therefore, that under the several Internal Revenue acts of 1864, 5, 6 and 7, the claim of the United States to a tax of five per centum on dividends declared after the 1st of January, 1870 and upon interest falling due and becoming payable on that day is not well founded.

SECOND. *The Act of 14th of July, 1870, considered as affecting the question.*

By the 17th section of the Act approved July 14th, 1870 (16 Stat. at Large, 256), Congress undertook to construe the meaning of certain sections of the Act of 1864, as amended by the acts of 1866 and 1867, and enacted "That sections 120, 121, 122 and 123 of the Act of June 30, 1864, entitled 'An Act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes,' as amended by the act of July 13, 1866, and the act of March 2, 1867, shall be construed to impose the taxes therein mentioned to the first day of August, 1870, but after that date no further taxes shall be levied or assessed under said sections." This effort on the part of Congress may be regarded as an admission at least, that in their opinion, the income tax had expired with the year 1869—and if it was thereby designed to perpetuate a law which, in point of fact, had ceased by its own limitation, it was legislative interpretation, and therefore, as affecting previously existing rights, of no binding force or effect. "A mistaken opinion of the legislature concerning the law does not make law. * * * * The legislature may pass a declaratory act, which, though inoperative on the past, may act in future."—Marshall C. J. in the *Postmaster General* vs. *Early*, 12 Wheaton 148. This appears to be so well settled by authority, that a repetition of, or addition to, the cases cited in the Brief for the Defendants in Error in the cases of Barnes *vs.* the Philadelphia and Reading Railroad, Nos. 334–337 of December, 1870, Supreme Court of the United States, becomes unnecessary.

In determining whether the Court below committed error, the Act of 1870 should not be regarded, for all that was done by the defendants in Error was done before its passage; subsequent legislative construction of the law was therefore a nullity as to acts or omissions occurring prior thereto.

CHAPMAN BIDDLE.
THEODORE CUYLER,
for Defendants in Error.

Judge Davis

In the Circuit Court of the United States,

EASTERN DISTRICT OF PENNSYLVANIA.

APRIL SESSION, 1870. No. 22.

THE PHILADELPHIA AND READING RAILROAD COMPANY

vs.

BARNES ET AL.

OPINION OF MR. JUSTICE STRONG.

The Leisenring Steam Printing House, 237 and 239 Dock Street, Philadelphia.

CIRCUIT COURT.

APRIL SESSIONS, 1870. No. 22.

THE PHILADELPHIA AND READING R. R. CO.

vs.

BARNES ET AL.

STRONG, J.—The substance of the second plea, to which there has been a demurrer, is, that the plaintiffs, who are a railroad company, declared a dividend on their capital stock to their stockholders, on the 22d of December, 1869, as part of their earnings, incomes and gains made and accrued between July 1st, 1869, and December 1st, 1869, and that the dividend was declared payable to the stockholders on and after the 17th of January, 1870. The plea further avers that a return thereof was afterwards made to the assessor of internal revenue of the United States, and a tax of five per cent. of the amount of the dividend was assessed by him upon the plaintiffs, which was due and payable on or before March 31st, 1870; that notice of the assessment was duly given, and a demand for payment was made upon the plaintiffs by the district collector; that the tax was not paid in response to the demand, whereupon the defendants, who were the collector and deputy collectors, on the 5th of May, 1870, made a distress for the tax, together with five per centum additional thereto, and the interest accrued thereon, and that this was the supposed trespass, &c.

It is a plea of justification; and, in order to determine its sufficiency or insufficiency, it is necessary to inquire whether there was any legal warrant for assessing and collecting such a tax. If there was, it is conceded it must be found in the internal revenue act of Congress of June 30th, 1864, as amended by its supplements. The primary question, then, is, Whether that act authorizes the levy and collection of a tax upon dividends declared by railroad companies in 1869, but declared to be payable at a time after December 31st of that year, and therefore not receivable by the stockholders until in the year 1870?

It is of course essential to the inquiry, that it be determined whether the tax upon railroad dividends was, by the act of 1864, made a permanent tax, or whether it was of temporary duration, like the income tax upon other gains and profits. I have no doubt that the tax upon dividends made by such companies, and upon the interest payable by them, described in the 122d section, is a part of the five per cent. tax imposed upon all incomes by the 116th section. By the 116th, as amended by the act of 1867, it was enacted that there should be levied, collected and paid annually upon the gains, profits and income of every person residing in the United States, or of any citizen of the United States residing abroad, whether derived from any kind of property, rents, *interest*, dividends, or salaries, or from any profession, trade, employment, or vocation carried on in the United States or elsewhere, *or from any source whatever*, a tax of five per centum on the amount so derived over one thousand dollars. The same section declared that the tax therein provided for should be assessed, collected and paid upon the gains, profits, or income for the year ending the 31st day of December next preceding the time for levying, collecting and paying said duty. What that time was directed to be, as well as the duration of the tax, was defined by the 119th section, which enacted as follows:—"That the taxes on incomes herein imposed shall be levied on the 1st day of March, and be due and payable on or before the 30th day of April in each year, until and including the year 1870, and no longer." It is noticeable that the language of the 116th section is very comprehensive. It extends to income of every description, whether derived from labor or property; and it particularly mentions that derived from interest and dividends, adding the words "or from any source whatever." It is true, that in the provisions made by Congress for estimating or ascertaining the gains, profits and income of any person, there are certain apparent exceptions. The 117th section, as amended by the act of 1867, required that there should be included in the estimate, *inter alia*, the share of any person of the gains and profits of all companies, whether incorporated or partnership, who would be entitled to the same if divided, whether divided or otherwise, "except the amount of income received from institutions or corporations whose officers, as required by law, withhold a per centum of the dividends made by such institutions, and pay the same to the officer authorized to receive the same, and except that portion of the salary or pay received for services in the civil, military, or naval, or other service of the United States, including senators, representatives and delegates in Congress, from which the tax has been deducted." But these exceptions recognize the dividends and interest received from such companies, and the gains from the salaries or pay of United States officers, as a part of the tax-payer's income. They are obviously introduced as a guide to the return of income, which the next following section requires to be made to the assistant assessor, and because a special mode of collecting the tax on such dividends, interest and salaries was intended to be provided.

It is indispensable to a correct understanding of the statute that all its sections relating to the same subject be read and considered together. Those numbered from 116 to 123, inclusive, are all classified under the title "Income," and they manifestly relate to the same subject. Together, they constitute a system devised to impose and collect a tax upon income or gains from any source whatever. The subject of the tax is one and the same, though consisting of numerous constituents. But the mode of assessment and of collection is different as applied to the constituents of income. Of a portion of his gains the tax-payer is required to make a return to the assistant assessor, and himself pay the tax on that portion to the district collector. But a different mode of collection is prescribed for the tax upon the dividends of banking, trust and insurance companies by the 120th section of the act, and by the 122d section, for the tax upon dividends declared and paid, and upon accumulated profits made, and upon interest paid on permanent loans by railroad, canal, turnpike, or slackwater navigation companies. Still, the tax is upon the individuals whose gains such dividends and interest are, and it is a tax at the same rate as that collected from other income; but the corporations are made the agents of the Government to collect it. Still another mode is prescribed by the 123d section for collecting the tax upon that part of a tax-payer's gains which consists of salaries received from the Federal Government, or payments for his services as an officer of the United States. That the disbursing officers are required to deduct at the same rate per cent. It is very obvious to me that these are only variant modes of collecting the tax on income imposed by the 116th section of the act. These portions of income were not required to be included in the general estimate, or in the return made to the assistant assessor, because their amount was as certainly ascertainable by the corporations or officers required to collect it, as it could be by any return of the tax-payer himself. Such a construction is demanded alike by the letter and the general spirit of the act. There is nothing to warrant the belief that Congress intended to impose a burden upon income derived from one species of property greater or longer continued than that imposed upon income from other property, or that they intended to discriminate against federal officers and compel them to pay a tax on their salaries, after taxes upon all other salaries had ceased. The dividends received by a shareholder of a railroad company, or a canal, turnpike, or slackwater navigation company, or of a banking, trust, or insurance company, are, in every sense, as much his income as are the dividends he may receive from any other company; for example, a bridge, or a manufacturing corporation: so is the interest received for loans to a railroad company as truly income of the bondholder as is the interest received by him on permanent loans to any other corporation, or to natural persons. Was it the intention of Congress to enact that one who lent his money to a telegraph company, or to a mining or manufacturing company, should be exempt from a tax upon his interest received after December 31st, 1869; but that one who lent to a canal or railroad company should continue to pay the tax indefinitely and for all time? Is such a reasonable construction of the act of 1864? And again: the salary of an officer of the United States is his income as certainly as the salary received by another from a corporation is his. Was it designed to tax one and exempt the other? To my mind the act shows no intent to make such discriminations. I must regard the 120th, 121st, 122d and 123d sections, not as imposing a distinct tax upon the subjects mentioned in them, but as having only the purpose to prescribe a peculiar mode of securing the collection of a portion of the tax previously imposed by the 116th section: and such, I think, has been, in effect, the construction adopted by the Supreme Court. In Jackson *vs.* The Northern Central Railway Company, a case tried in the Circuit Court of the United States for the District of Maryland, the primary question was, Whether the tax on interest payable by railroad companies was chargeable against non-resident aliens; and it was ruled by the Chief Justice that it was not. The ruling was based upon the position, that the tax on such interest was the same as that imposed by the 116th section, viz., a part of the income tax, and that as the 116th section did not include non-resident aliens, the tax on interest spoken of in the 122d was not chargeable against them,—the deduction of five per cent. being only a mode of collecting the income tax. This decision was subsequently affirmed in the Supreme Court, 7 Wallace, 262, and the language of the court was as follows:—"The decision was placed mainly upon the ground, that, looking at the several provisions bearing upon the question, and giving to them a reasonable construction, it was believed not to be the intent of Congress to impose an income tax on non-resident aliens; that they were not only not included in the description of persons upon whom the tax was imposed, but were impliedly excluded by confining it to residents of the United States and citizens residing abroad, [an exclusion only found in the 116th section,] and that the deduction from the prescribed income of the interest on these railroad bonds, when paid by the companies, was regarded as simply a mode of collecting this part of the income tax. We concur in this view." I understand this case as determining several things: *First*, that the 116th and 122d sections of the act of 1864 are parts of one system, devised for income taxation; *Second*, that the tax on railroad dividends, and on interest of railroad indebtedness, is not a different tax from that imposed upon income generally; and, *Third*, that the 122d section was intended merely to provide a special mode of collection for a part of the tax.

Accepting, then, the conclusion, that the tax on railroad dividends, &c. is only a part of the tax on income generally, imposed by the 116th section, and that the purpose of the 122d was not to impose a distinct tax, but to designate collectors and provide a special mode of collection, I proceed to consider what is the effect of the limitation clause in the 119th section. I have already quoted it; I quote it again for convenience:—"The taxes on incomes herein imposed shall be levied on the 1st day of May, and be due and payable on or before the 30th day of June in each year, until and including the year 1870, and no longer." Whatever else this clause may mean, it manifestly embraces, in terms, taxes on all income from any source,—income upon which the act imposed a tax. It excepts none. It does not speak of taxes on income, a return of which is required to be made by the tax-payer, but its language is, "*taxes on incomes herein imposed.*" The 119th section imposes no tax. The reference must, therefore, be to taxes on income imposed by other sections of the act,—to all of them, as well those on railroad dividends, &c., as those on dividends made by telegraph companies, or gains received from any other source.

The clause also manifests a clear intent, that the income to which it refers should not be subject to a tax, unless derived or received prior to January 1st, 1870. This appears clearly when construed in connection with the 116th section, as it must be. That section enacted, as has already been noticed, that the tax therein provided for, including the tax on income from any source whatever, should be assessed, collected and paid upon the gains, profits and income for the year ending the 31st day of December next preceding the time for levying, collecting and paying said tax. This provision must be assumed to have been in the mind of Congress when the 119th section was framed. Therefore, though the last tax was required to be levied on the 1st of March, 1870, it was designed to be a tax on the income of 1869; for unless the time for the levy had been fixed in 1870, a large portion of the income of 1869—probably much the largest portion—would have escaped the tax entirely. Then the provision that the taxes on income should be levied on the first day of May in each year, until and including the year 1870, and no longer, must mean that the income of 1870 should not be subject to taxation. If the income referred to was *all* income, as I have shown it was, in terms, it is difficult to avoid the conclusion, that the act of Congress authorizes no tax upon any income accrued, derived or received from any source during the present year. The only doubt I entertain in regard to the soundness of this interpretation is raised by the fact that the limitation mentioned in the 119th section is applied to the time of the levy, and that no express mention is made of taxes on railroad dividends, &c.; but, upon reflection, I think such express mention would have been superfluous, except, perhaps, to solve a doubt, which does not appear to have been in the mind of Congress. It seems to me that light is thrown upon the subject, by observing what must have been the course of thought in the legislative mind when the system of income taxation was devised and expressed in the statute. The first thought was that of an annual tax upon all annual income. That was embodied in the 116th section. Next arose the inquiry, whether the tax should be upon the income of the current year, or upon that of the year next preceding its collection. That was answered in the same section. Obviously, the inquiry then arose, How shall the income be ascertained? and for that provision was made in the 117th and 118th sections. Then followed the 119th, which provided for three things: *First*, at what time in each year the levy should be made and the tax become payable; *Second*, how long the tax should continue; and, *Third*, how it should be collected. Then followed some special provisions, not imposing any new or distinct tax, but in aid of the collection of the tax previously imposed. It seems to have occurred to Congress that, as to a portion of income, mainly dividends, interest on funded debt of large corporations and federal salaries, the machinery of a return to the district assistant assessor was unnecessary; that the amount of such income was more readily and more certainly ascertainable in another way; and that the collection of the tax might more easily be made by the institutions that had the income in hand than by the district collectors. Hence the provision made in the 120th, 121st, 122d and 123d sections, intended to direct peculiar and exceptional modes of collection, and nothing more. It is true, they compelled the payment of the tax before the expiration of the year in which it was received; and in that respect, as well as in the mode prescribed for collection, they distinguished between the kinds of income specified and income generally. But the act guarded against gross inequality by authorizing a deduction of the income upon which the tax had been paid from the estimate returned to the assessor.

Upon the whole, in view of these considerations, I am of opinion that, except as to the time and mode of collection, Congress had no intention of placing the tax on those species of income mentioned in the 120th, 121st, 122d and 123d sections on any different footing from the tax on all other income, and that the statute does not impose upon it a burden greater or longer continued than is laid upon income generally; and I am confirmed in my opinion by the conviction that it allows a reasonable construction to the act of Congress. If I am wrong in my conclusions, if a tax upon railroad dividends, made payable to the stockholders in 1870, or upon interest upon railroad debt falling due in 1870, may be charged and collected under the act, then the tax is grossly unequal; and that part of a person's income which consists of such dividends is subjected to a burden from which other income is exempt. Under the act of 1864 a tax has been levied upon all incomes, including those from dividends and interest of railroad companies in every year from 1864 to 1869, inclusive. Six of these annual taxes have now been laid. I refer now only to those levied under the act of 1864. And the tax upon such portions of each annual income as consist of railroad dividends has been paid by the companies, and presumably charged to the stockholders. If it has not been thus paid, that income has been returned to the assistant assessor, and charged by him; for, as directed by the 117th section, only that income from dividends and interest was allowed to be deducted from the general aggregates which had been assessed, and the tax upon which had been paid by the institutions from which it was derived. Income from railroad dividends has, therefore, paid six annual income taxes, and no more have been assessed against other income. It is not to be presumed, in the absence of a clearly expressed contrary intent, that a discrimination was intended.

But I may not overlook the later act of Congress, passed July 14th, 1870, the 17th section of which enacts "that sections 120, 121, 122 and 123 of the act of June 30th, 1864, entitled 'An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes,' as amended by the act of July 13th, 1866, and the act of March 2d, 1867, shall be construed to impose the taxes therein mentioned to the first day of August, 1870, but after that date no further taxes shall be levied and assessed under said section." This was doubtless intended as a legislative construction of the sections of the act designated. I shall not pause to inquire how far the law-making power can determine authoritatively the meaning of an existing statute. The construction or interpretation of a statute would seem to be, ordinarily, a judicial, rather than a legislative, function. I know that acts declaratory of the meaning of former acts are not uncommon: they are always to be regarded with great respect, as expressive of legislative opinion; and, so far as they can operate upon subsequent transactions, they are of binding force, and unobjectionable. But it is well settled that they cannot operate to disturb rights vested or acquired before their enactment, or to impose penalties for acts done before their passage,—acts lawful when they were done. It is always presumed that the Legislature had no intention to give them such an effect.

Now, if the income tax imposed by the act of 1864, and its supplements, expired with the 31st of December, 1869, except that the law provided for the collection of that portion of the tax on the income of 1869 which had not been paid—if the act of 1864 did not prescribe a tax upon dividends made and interest paid by railroad companies after December 31st, 1869, as I have endeavored to show, it was not the duty of these plaintiffs to pay to the district collector five per cent. of the dividend made by them, and declared payable January 17th, 1870, and they had no authority to detain any portion of it from their stockholders. It was their right, as well as their duty, to pay over the entire dividend to the shareholders who had then acquired a vested right in it; and the plea of the defendants does not aver that the whole dividend was not at once thus paid over. Then the distress, which the plea attempts to justify, was made to enforce the performance of a duty that had no existence. It was substantially an attempt to enforce a penalty upon the plaintiffs for an omission to do that which they had no right to do,—a penalty equal to the amount of a five per cent. tax with an additional five per cent. thereon. It is to be remembered, that the tax is levied upon the shareholders, and that the company is merely the Government agent to collect it. Its liability to a distress, if any there be, arose out of an unlawful failure to collect the tax and pay it over. But the failure was not unlawful at the time. Surely, it will not be maintained that the declaratory act of 1870 can be regarded as operating retrospectively to make the act or omission of the plaintiffs unlawful, and punishable as an offense, when the act or omission was innocent at the time when it occurred. Were it conceded that the construction given by Congress is binding in all cases where it would not disturb vested rights, or operate practically as an *ex post facto* law, it is not to be presumed it was intended for application to such a case as the present. Of course, I am not to be understood as maintaining that in July, 1870, when the declaratory act was passed, Congress had not power to impose a tax upon any income that had been received before that time. What I mean to say is, that it is not to be admitted Congress intended by that act to subject any institution to a penalty for not having, before its passage, collected a tax which had not been imposed.

Is, then, a dividend declared December 22d, 1869, but declared to be payable January 17th, 1870, income of 1869, or of 1870, within the meaning of the act of Congress? I think it must be income of the latter year. True, it was earned by the company in 1869, but it was not available to the stockholder. The act speaks of income derived from any kind of property, &c. It seems to contemplate a tax upon income received, or receivable,—something out of which the tax can be paid. If it were not so, the tax might be exacted for that which never came, and never could come, into the hands of the tax-payer. The language of the 122d section is also significant. In speaking of the companies therein mentioned it declares, they "shall be subject to, and pay a duty of, five per centum on the amount of all such interest, or coupons, dividends, or profits, *whenever the same shall be payable.*" In other words, the duty arises when the dividend is payable. And such is the construction that has been given to the act, in accordance with which the taxes have been collected. Prior to the act of 1864 there was a tax on the dividends at the rate of three per cent.; and when, by that act, the rate was raised to five per cent., the Commissioner of Internal Revenue issued a circular, dated July 1st, 1864, declaring that "all dividends payable on and after July 1st, 1864, no matter when declared, are subject to the duty of five per centum." I am not aware that any different construction of the act has ever prevailed. My opinion, therefore, is, that the dividend declared by the plaintiffs must be regarded as income of the stockholders for the year in which it became payable. It follows that the assessor was without authority to assess a tax upon it; and that the plea of the defendants does not justify the distress they made to enforce its payment by the plaintiffs, together with the payment of a five per cent. additional penalty.

Judgment on the demurrer is, therefore, directed against the defendants.

Judge Davis

Income Tax Sections

OF THE

ACT OF CONGRESS OF JUNE 30th, 1864,

As originally Passed and as subsequently Amended.

THE LEISENRING PRINT.

INCOME TAX SECTIONS OF THE ACT OF JUNE 30th, 1864, AS ORIGINALLY PASSED, AND AS SUBSEQUENTLY AMENDED.

Section 116 as originally passed (13 Stat. at Large, 281).

And be it further enacted, That there shall be levied, collected, and paid annually upon the annual gains, profits, or income of every person residing in the United States, or of any citizen of the United States residing abroad, whether derived from any kind of property, rents, interests, dividends, salaries, or from any profession, trade, employment, or vocation, carried on in the United States or elsewhere, or from any other source whatever, except as hereinafter mentioned, if such annual gains, profits, or income exceed the sum of six hundred dollars, a duty of five per centum on the excess over six hundred dollars and not exceeding five thousand dollars; and a duty of seven and one-half of one per centum per annum on the excess over five thousand dollars, and not exceeding ten thousand dollars; and a duty of ten per centum on the excess over ten thousand dollars. And the duty herein provided for shall be assessed, collected, and paid upon the gains, profits, or income for the year ending the thirty-first day of December next, preceding the time for levying, collecting, and paying said duty: *Provided*, That income derived from interest upon notes, bonds, and other securities of the United States shall be included in estimating incomes under this section: *Provided*, That only one deduction of six hundred dollars shall be made from the aggregate incomes of all the members of any family composed of parents and minor children, or husband and wife, except in cases where such separate income shall be derived from the separate and individual estate, gains, or labor of the wife or child: *And provided further*, That net profits realized by sales of real estate purchased within the year for which income is estimated, shall be chargeable as income; and losses on sales of real estate purchased within the year for which income is estimated shall be deducted from the income of such year.

Section 116 as amended by act of March 3d, 1865 (13 Stat. at Large, 479); by act of July 13th, 1866, §9 (14 ibid., 137); and by act of March 2d, 1867, §13 (14 ibid., 477).

That there shall be levied, collected, and paid annually, upon the gains, profits, and income of every person residing in the United States, or of any citizen of the United States residing abroad, whether derived from any kind of property, rents, interests, dividends, or salaries, or from any profession, trade, employment, or vocation, carried on in the United States or elsewhere, or from any other source whatever, a tax of five per centum on the amount so derived over one thousand dollars, and a like tax shall be levied, collected, and paid annually upon the gains, profits, and income of every business, trade, or profession carried on in the United States by persons residing without the United States, and not citizens thereof. And the tax herein provided for shall be assessed, collected, and paid upon the gains. profits, and income for the year ending the thirty-first day of December next preceding the time for levying, collecting, and paying said tax.

Section 117 as originally passed (13 Stat. at Large, 281).

And be it further enacted, That in estimating the annual gains, profits, or income of any person, all national, State, and municipal taxes, other than the national income tax, lawfully assessed within the year upon the property or sources of income of any person, as aforesaid, from which said annual gains, profits, or income is or should be derived, shall be deducted, in addition to six hundred dollars, from the gains, profits, or income of the person who has actually paid the same, whether owner, tenant or mortgagor; also the salary or pay received for services in the civil, military, naval, or other service of the United States, including senators, representatives, and delegates in Congress, above the rate of six hundred dollars per annum; and there shall also be deducted the income derived from dividends on shares in the capital stock of any bank, trust company, savings institution, insurance, railroad, canal, turnpike, canal navigation, or slackwater company, and the interest on any bonds or other evidences of indebtedness of any such corporation or company, which shall have been assessed and the tax paid, as hereinafter provided; also the amount paid by any person for the rent of the homestead used or occupied by himself or his family, and the rental value of any homestead used or occupied by any person or by his family, in his own right or in the right of his wife, shall not be included and assessed as part of the income of such person. In estimating the annual gains, profits, or income of any person, the interest over and above the amount of interest paid upon all notes, bonds, and mortgages, or other forms of indebtedness, bearing interest, whether due and paid or not, if good and collectable, shall be included and assessed as part of the income of such person for each year; and also all income or gains derived from the purchase and sale of stocks or other property, real or personal, and the increased value of live stock, whether sold or on hand, and the amount of sugar, wool, butter, cheese, pork, beef, mutton, or other meats, hay and grain, or other vegetable or other productions of the estate of such person sold, not including any part thereof unsold or on hand during the year next preceding the thirty-first of December, shall be included and assessed as part of the income of such person for each year, and the gains and profits of all companies, whether incorporated or partnership, other than the companies specified in this section, shall be included in estimating the annual gains, profits, or income of any person entitled to the same, whether divided or otherwise. In estimating deductions from income, as aforesaid, when any person rents buildings, lands, or other property, or hires labor to carry on land, or to conduct any other business from which such income is actually derived, or pays interest upon any actual incumbrance thereon, the amount actually paid for such rent, labor, or interest shall be deducted; and also the amount paid out for usual or ordinary repairs, not exceeding the average paid out for such purposes for the preceding five years, shall be deducted, but no deduction shall be made for any amount paid out for new buildings, permanent improvements, or betterments, made to increase the value of any property or estate: *Provided*, That in cases where the salary or other compensation paid to any person in the employment or service of the United States shall not exceed the rate of six hundred dollars per annum, or shall be by fees, or uncertain or irregular in the amount or in the time during which the same shall have accrued or been earned, such salary or other compensation shall be included in estimating the annual gains, profits, or income of the person to whom the same shall have been paid, in such manner as the Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, may prescribe.

Section 117 as amended by act of March 3d, 1865, §1, (13 Stat. at Large, 479,) and by act of March 2d, 1867, §13 (14 ibid., 478).

That, in estimating the gains, profits, and income of any person, there shall be included all income derived from interest upon notes, bonds, and other securities of the United States; profits realized within the year from sales of real estate purchased within the year, or within two years previous to the year for which income is estimated; interest received or accrued upon all notes, bonds, and mortgages, or other forms of indebtedness bearing interest, whether paid or not, if good and collectable, less the interest which has become due from said person durinthe year; the amount of all premium on gold and coupons; the amount of sales of live stock, sugar, wool, butter, cheese, pork, beef, mutton, or other meats, hay and grain, or other vegetable or other productions, being the growth or produce of the estate of such person, not including any part thereof consumed directly by the family; all other gains, profits, and income derived from any source whatever, except the rental value of any homestead, used or occupied by any person, or by his family in his own right, or in the right of his wife; and the share of any person of the gains and profits of all companies, whether incorporated or partnership, who would be entitled to the same, if divided, whether divided or otherwise, except the amount of income received from institutions or corporations, whose officers, as required by law, withhold a per centum of the dividends made by such institutions, and pay the same to the officer authorized to receive the same; and except that portion of the salary or pay received for services in the civil, military, naval, or other service of the United States, including senators, representatives, and delegates in Congress, from which the tax has been deducted. And in addition to one thousand dollars exempt from income tax, as hereinbefore provided, all national, State, county, and municipal taxes paid within the year shall be deducted from the gains, profits, or income of the person who has actually paid the same, whether such person be owner, tenant, or mortgagor; losses actually sustained during the year arising from fires, shipwreck, or incurred in trade, and debts ascertained to be worthless, but excluding all estimated depreciation of values and losses within the year on sales of real estate purchased two years previous to the year for which income is estimated; the amount actually paid for labor or interest by any person who rents lands or hires labor to cultivate land, or who conducts any other business from which income is actually derived; the amount actually paid by any person for the rent of the house or premises occupied as a residence for himself or his family; the amount paid out for usual or ordinary repairs: *Provided*, That no deduction shall be made for any amount paid out for new buildings, permanent improvements, or betterments, made to increase the value of any property or estate: *And provided further*, That only one deduction of one thousand dollars shall be made from the aggregate income of all the members of any family, composed of one or both parents and one or more minor children, or husband and wife; that guardians shall be allowed to make such deduction in favor of each and every ward, except that in case where two or more wards are comprised in one family, and have joint property interest, only one deduction shall be made in their favor: *And provided further*, That in cases where the salary or other compensation paid to any person in the employment or service of the United States shall not exceed the rate of one thousand dollars per annum, or shall be by fees, or uncertain or irregular in the amount or in the time during which the same shall have accrued or been earned, such salary or other compensation shall be included in estimating the annual gains, profits, or income of the person to whom the same shall have been paid.

Section 118 as originally passed (13 Stat. at Large, 282).

And be it further enacted, That it shall be the duty of all persons of lawful age, and all guardians and trustees, whether such trustees are so by virtue of their office as executors, administrators, or in other fiduciary capacity, to make a list or return under oath or affirmation, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, to the assistant assessor of the district in which he resides, of the amount of his or her income, or the income of such minors or persons as may be held in trust as aforesaid, according to the requirements hereinbefore mentioned, stating the sources from which said income is derived, whether from any kind of property, or the purchase and sale of property, rents, interest, dividends, salaries, or from any profession, trade, employment, or vocation, or otherwise. And in case of neglect or refusal to make such return, the assessor or assistant assessor shall assess the amount of his or her income, and the duty thereon, in the same manner as is provided for in other cases of neglect and refusal to furnish lists or returns in the provisions of this act, where not otherwise incompatible; and the assistant assessor may increase the amount of the list or return, or of any party making such return, if he shall be satisfied that the same is understated: *Provided*, That any party in his or her own behalf, or as guardian or trustee, as aforesaid, shall be permitted to declare, under oath or affirmation, the form and manner of which shall be prescribed by the Commissioner of Internal Revenue, that he or she was not possessed of an income of six hundred dollars, liable to be assessed according to the provisions of this act, or may declare that he or she has been assessed elsewhere in the same year for and has paid an income duty, under authority of the United States, and shall thereupon be exempt from income duty in said district; or, if the list or return of any party shall have been increased by the assistant assessor, in manner as aforesaid, such party may be permitted to declare, under oath or affirmation, the amount of annual income, or the amount held in trust, as aforesaid, liable to be assessed, and the same, so declared, shall be received by such assistant assessor as true, and as the sum upon which duties are to be assessed and collected, except that the deductions claimed in such cases shall not be made or allowed until approved by the assistant assessor. But any person feeling aggrieved by the decision of the assistant assessor in such cases, may appeal to the assessor of the district, and his decision thereon shall be final; and the form, time, and manner of proceedings shall be subject to rules and regulations to be prescribed by the Commissioner of Internal Revenue.

Section 118, as amended by act of March 3d, 1865, §1, (13 Stat. at Large, 480,) and by act of March 2d, 1867, §13 (14 ibid., 479).

That it shall be the duty of all persons of lawful age to make and render a list or return, on or before the day prescribed by law, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, to the assistant assessor of the district in which they reside, of the amount of their income, gains, and profits, as aforesaid; and all guardians and trustees, executors and administrators, or any person acting in any other fiduciary capacity, shall make and render a list or return, as aforesaid, to the assistant assessor of the district in which such person acting in a fiduciary capacity resides, of the amount of income, gains, and profits of any minor or person for whom they act; and the assistant assessor shall require every list or return to be verified by the oath or affirmation of the party rendering it, and may increase the amount of any list or return, if he has reason to believe that the same is understated; and in case any such person shall neglect or refuse to make and render such list or return, or shall render a false or fraudulent list or return, it shall be the duty of the assessor or the assistant assessor to make such list, according to the best information he can obtain, by the examination of such person, or his books or accounts, or any other evidence, and to add fifty per centum as a penalty to the amount of the tax due on such list in all cases of wilful neglect or refusal to make and render a list or return; and, in all cases of a false or fraudulent list or return having been rendered, to add one hundred per centum, as a penalty, to the amount of tax ascertained to be due, the tax and the additions thereto as penalty to be assessed and collected in the manner provided for in other cases of wilful neglect or refusal to render a list or return, or of rendering a false and fraudulent return: *Provided,* That any party, in his or her own behalf, or as such fiduciary, shall be permitted to declare, under oath or affirmation, the form and manner of which shall be prescribed by the Commissioner of Internal Revenue, that he or she, or his or her ward or beneficiary, was not possessed of an income of one thousand dollars, liable to be assessed according to the provisions of this act; or may declare that he or she has been assessed and paid an income tax elsewhere in the same year, under authority of the United States, upon his or her income, gains, and profits, as prescribed by law; and, if the assistant assessor shall be satisfied of the truth of the declaration, shall thereupon be exempt from income tax in the said district; or if the list or return of any party shall have been increased by the assistant assessor, such party may exhibit his books and accounts, and be permitted to prove and declare, under oath or affirmation, the amount of income liable to be assessed; but such oaths and evidence shall not be considered as conclusive of the facts, and no deductions claimed in such cases shall be made or allowed until approved by the assistant assessor. Any person feeling aggrieved by the decision of the assistant assessor in such cases, may appeal to the assessor of the district, and his decision thereon, unless reversed by the Commissioner of Internal Revenue, shall be final, and the form, time, and manner of proceedings shall be subject to rules and regulations to be prescribed by the Commissioner of Internal Revenue: *Provided further*, That no penalty shall be assessed upon any person for such neglect or refusal, or for making or rendering a false or fraudulent return, except after reasonable notice of the time and place of hearing, to be regulated by the Commissioner of Internal Revenue, so as to give the person charged an opportunity to be heard.

Section 119 as originally passed (13 Stat. at Large, 283).

And be it further enacted, That the duties on incomes herein imposed shall be levied on the first day of May, and be due and payable on or before the thirtieth day of June, in each year, until and including the year eighteen hundred and seventy, and no longer; and to any sum or sums annually due and unpaid for thirty days after the thirtieth of June, as aforesaid, and for ten days after demand thereof by the collector, there shall be levied in addition thereto the sum of ten per centum on the amount of duties unpaid, as a penalty, except from the estates of deceased and insolvent persons. And if any person liable to pay such duty shall neglect or refuse to pay the same, after such demand, the amount due shall be a lien in favor of the United States from the time it was due until paid, with the interest, penalties, and costs that may accrue in addition thereto, upon all the property and rights to property belonging to such person; and in default of the payment of said duty aforesaid, said lien may be enforced by distraint upon such property, rights to property, stocks, securities, and evidences of debt, by whomsoever holden; and for this purpose the collector, after demands duly given, as aforesaid, shall issue a warrant, in form and manner to be prescribed by the Commissioner of Internal Revenue, under the directions of the Secretary of the Treasury, and by virtue of such warrant there may be levied on such property, rights to property, stocks, securities, and evidences of debt, a further sum, to be fixed and stated in such warrant, over and above the said annual duty, interest, and penalty for non-payment, sufficient for the fees, costs, and expenses of such levy. And in all cases of sale, as aforesaid, the certificate of such sale by the collector shall vest in the purchaser all right, title, and interest of such delinquent in and to such property, whether the property be real or personal; and where the subject of sale shall be stocks, the certificate of said sale shall be lawful authority and notice to the proper corporation, company, or association, to record the same on the books or records, in the same manner as if transferred or assigned by the person or party holding the same, to issue new certificates of stock therefor in lieu of any original or prior certificates, which shall be void, whether canceled or not. And said certificates of sale of the collector, where the subject of sale shall be securities or other evidences of debt, shall be good and valid receipts to the person holding the same, as against any person holding, or claiming to hold, possession of such securities or other evidences of debt.

Section 119 as amended by act of March 3d, 1865, §1 (13 Stat. at Large, 481); by act of July 13th, 1866, §9 (14 ibid., 138); and by act of March 2d, 1867, §13 (14 ibid., 480).

That the taxes on incomes herein imposed shall be levied on the first day of March, and be due and payable on or before the thirtieth day of April, in each year, until and including the year eighteen hundred and seventy, and no longer; and to any sum or sums annually due and unpaid after the thirtieth of April, as aforesaid, and for ten days after notice and demand thereof by the collector, there shall be levied in addition thereto the sum of five per centum on the amount of taxes unpaid, and interest at the rate of one per centum per month upon said tax from the time the same became due, as a penalty, except from the estates of deceased, insane, or insolvent persons: *Provided*, That the tax on incomes for the year 1866 shall be levied on the day this act takes effect.

Section 120 as originally passed (13 Stat. at Large, 283).

And be it further enacted, That there shall be levied and collected a duty of five per centum on all dividends in scrip or money thereafter declared due, and whenever the same shall be payable, to stockholders, policy-holders, or depositors, as part of the earnings, income, or gains of any bank, trust company, savings institution, and of any fire, marine, life, inland insurance company, either stock or mutual, under whatever name or style known or called, in the United States or territories, whether specially incorporated or existing under general laws, and on all undistributed sums, or sums made or added during the year to their surplus or contingent funds; and said banks, trust companies, savings institutions, and insurance companies shall pay the said duty, and are hereby authorized to deduct and withhold from all payments made on account of any dividends or sums of money that may be due and payable as aforesaid, the said duty of five per centum. And a list or return shall be made and rendered to the assessor or assistant assessor in duplicate, and one of said lists or returns shall be transmitted, and the duty paid, to the Commissioner of Internal Revenue within thirty days after the time when any dividends or sums of money become due or payable as aforesaid; and said list or return shall contain a true and faithful account of the amount of duties as aforesaid; and there shall be annexed thereto a declaration of the president, cashier, or treasurer of the bank, trust company, savings institution, or insurance company, under oath or affirmation, in form and manner as may be prescribed by the Commissioner of Internal Revenue, that the same contains a true and faithful account of the duties as aforesaid. And for any default in the making or rendering of such list or return, with such declaration annexed, the bank, trust company, savings institution, or insurance company making such default, shall forfeit, as a penalty, the sum of one thousand dollars; and in case of any default in making or rendering said list or return, or of any default in the payment of the duty as required, or any part thereof, the assessment and collection of the duty and penalty shall be in accordance with the general provisions of law in other cases of neglect and refusal: *Provided*, That the duty upon the dividends of life insurance companies shall not be deemed due or to be collected until such dividends shall be payable by such companies, nor shall the portion of premiums returned by mutual life insurance companies to their policy-holders be considered as dividends or profits under this act.

Section 120 as amended by act of March 3d, 1865, (13 Stat. at Large, 481,) and by act of July 13th, 1866, §9 (14 ibid., 138).

That there shall be levied and collected a tax of five per centum on all dividends in scrip or money thereafter declared due, wherever and whenever the same shall be payable, to stockholders, policy-holders, or depositors or parties whatsoever, including non-residents, whether citizens or aliens, as part of the earnings, income, or gains of any bank, trust company, savings institution, and of any fire, marine, life, inland insurance company, either stock or mutual, under whatever name or style known or called, in the United States or territories, whether specially incorporated or existing under general laws, and on all undistributed sums, or sums made or added during the year to their surplus or contingent funds; and said banks, trust companies, savings institutions, and insurance companies shall pay the said tax, and are hereby authorized to deduct and withhold from all payments made on account of any dividends or sums of money that may be due and payable, as aforesaid, the said tax of five per centum. And a list or return shall be made and rendered to the assessor or assistant assessor on or before the tenth day of the month following that in which any dividends or sums of money become due or payable, as aforesaid; and said list or return shall contain a true and faithful account of the amount of taxes as aforesaid; and there shall be annexed thereto a declaration of the president, cashier, or treasurer of the bank, trust company, savings institution, or insurance company, under oath or affirmation, in form and manner as may be prescribed by the Commissioner of Internal Revenue, that the same contains a true and faithful account of the taxes as aforesaid. And for any default in the making or rendering of such list or return, with such declaration annexed, the bank, trust company, savings institution, or insurance company making such default shall forfeit, as a penalty, the sum of one thousand dollars; and in case of any default in making or rendering said list or return, or of any default in the payment of the tax as required, or any part thereof, the assessment and collection of the tax and penalty shall be in accordance with the general provisions of law in other cases of neglect and refusal: *Provided*, That the tax upon the dividends of life insurance companies shall not be deemed due until such dividends are payable; nor shall the portion of premiums returned by mutual life insurance companies to their policy-holders, nor the annual or semi-annual interest allowed or paid to the depositors in savings banks or savings institutions, be considered as dividends. (See act of March 10th, 1866, declaring meaning of parts of this section.)

Section 121 as originally passed (*13 Stat. at Large, 284*).

And be it further enacted, That any bank, legally authorized to issue notes as circulation, which shall neglect or omit to make dividends or additions to its surplus or contingent fund as often as once in six months, shall make a list or return in duplicate, under oath or affirmation of the president or cashier, to the assessor or assistant assessor of the district in which it is located, on the first day of January and July in each year, or within thirty days thereafter, of the amount of profits which have accrued or been earned and received by said bank during the six months next preceding said first days of January and July; and shall present one of said lists or returns and pay to the collector of the district a duty of five per centum on such profits; and in case of default to make such list or return and payment within the thirty days as aforesaid, shall be subject to the provisions of the foregoing section of this act: *Provided*, That when any dividend is made which includes any part of the surplus or contingent fund of any bank, trust company, savings institution, insurance or railroad company, which has been assessed and the duty paid thereon, the amount of duty so paid on that portion of the surplus or contingent fund may be deducted from the duty on such dividend. (No amendment.)

Section 122 as originally passed (*13 Stat. at Large, 284*).

And be it further enacted, That any railroad, canal, turnpike, canal navigation, or slackwater company indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip, or money due or payable to its stockholders, as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a duty of five per centum on the amount of all such interest or coupons, dividends or profits, whenever the same shall be payable; and said companies are hereby authorized to deduct and withhold from all payments, on account of any interest, or coupons and dividends due and payable as aforesaid, the duty of five per centum; and the payment of the amount of said duty so deducted from the interest, or coupons, or dividends, and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend, or interest, or coupon, on the bonds or other evidences of their indebtedness so held by any person or party whatever, except where said companies may have contracted otherwise. And a list or return shall be made and rendered to the assessor or assistant assessor in duplicate, and one of said lists or returns shall be transmitted, and the duty paid, to the Commissioner of Internal Revenue within thirty days after the time when said interest, coupons, or dividends become due and payable, and as often as every six months; and said list or return shall contain a true and faithful account of the amount of the duty, and there shall be annexed thereto a declaration of the president or treasurer of the company, under oath or affirmation, in form and manner as may be prescribed by the Commissioner of Internal Revenue, that the same contains a true and faithful account of said duty. And for any default in making or rendering such list or return, with the declaration annexed, or of the payment of the duty as aforesaid, the company making such default shall forfeit as a penalty the sum of one thousand dollars; and in case of any default in making or rendering said list or return, or of the payment of the duty, or any part thereof, as aforesaid, the assessment and collection of the duty and penalty shall be made according to the provisions of law in other cases of neglect or refusal.

Section 122 as amended by act of July 13th, 1866, §9 (14 Stat. at Large, 138).

That any railroad, canal, turnpike, canal navigation, or slackwater company, indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip or money due or payable to its stockholders, including non-residents, whether citizens or aliens, as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a tax of five per centum on the amount of all such interest or coupons, dividends or profits, whenever and wherever the same shall be payable, and to whatsoever party or person the same may be payable, including non-residents, whether citizens or aliens; and said companies are hereby authorized to deduct and withhold from all payments on account of any interest or coupons, and dividends, due and payable as aforesaid, the tax of five per centum; and the payment of the amount of said tax so deducted from the interest, or coupons, or dividends, and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend, or interest, or coupon on the bonds or other evidences of their indebtedness so held by any person or party whatever, except where said companies may have contracted otherwise. And a list or return shall be made and rendered to the assessor or assistant assessor on or before the tenth day of the month following that in which said interest, coupons, or dividends become due and payable, and as often as every six months; and said list or return shall contain a true and faithful account of the amount of tax, and there shall be annexed thereto a declaration of the president or treasurer of the company, under oath or affirmation, in form and manner as may be prescribed by the Commissioner of Internal Revenue, that the same contains a true and faithful account of said tax. And for any default in making or rendering such list or return, with the declaration annexed, or of the payment of the tax as aforesaid, the company making such default shall forfeit as a penalty the sum of one thousand dollars; and in case of any default in making or rendering said list or return, or of the payment of the tax or any part thereof, as aforesaid, the assessment and collection of the tax and penalty shall be made according to the provisions of law in other cases of neglect or refusal: *Provided*, That whenever any of the companies mentioned in this section shall be unable to pay the interest on their indebtedness, and shall in fact fail to pay such interest, in such cases the tax levied by this section shall not be paid to the United States until said company resume the payment of interest on their indebtedness. (See act of March 10th, 1866, declaring meaning of parts of this section.)

Section 123 as originally passed (*13 Stat. at Large, 285*).

And be it further enacted, That there shall be levied, collected, and paid on all salaries of officers, or payments for services to persons in the civil, military, naval, or other employment or service of the United States, including senators and representatives and delegates in Congress, when exceeding the rate of six hundred dollars per annum, a duty of five per centum on the excess above the said six hundred dollars; and it shall be the duty of all paymasters and all disbursing officers under the Government of the United States, or in the employ thereof, when making any payments to officers and persons as aforesaid, or upon settling and adjusting the accounts of such officers and persons, to deduct and withhold the aforesaid duty of five per centum, and shall, at the same time, make a certificate stating the name of the officer or person from whom such deduction was made, and the amount thereof, which shall be transmitted to the office of the Commissioner of Internal Revenue, and entered as part of the internal duties; and the pay-roll, receipts, or account of officers or persons paying such duty, as aforesaid, shall be made to exhibit the fact of such payment. And it shall be the duty of the several auditors of the Treasury Department, when auditing the accounts of any paymaster or disbursing officer, or when settling or adjusting the accounts of any such officer, to require evidence that the duties or taxes mentioned in this section have been deducted and paid over to the Commissioner of Internal Revenue: *Provided*, That payments of prize money shall be regarded as income from salaries, and the duty thereon shall be adjusted and collected in like manner.

Section 123 as amended by act of July 13th, 1866, §9, (14 Stat. at Large, 139,) and by act of March 2d, 1867, §13 (14 ibid., 480).

That there shall be levied, collected, and paid on all salaries of officers, or payments for services to persons in the civil, military, naval, or other employment or service of the United States, including senators, representatives, and delegates in Congress, when exceeding the rate of one thousand dollars per annum, a tax of five per centum on the excess above the said one thousand dollars; and it shall be the duty of all paymasters and all disbursing officers under the Government of the United States, or persons in the employ thereof, when making any payment to any officers or persons as aforesaid, whose compensation is determined by a fixed salary, or upon settling or adjusting the accounts of such officers or persons, to deduct and withhold the aforesaid tax of five per centum; and the pay-roll, receipts, or account of officers or persons paying such tax as aforesaid, shall be made to exhibit the fact of such payment. And it shall be the duty of the accounting officers of the Treasury Department, when auditing the accounts of any paymaster or disbursing officer, or any officer withholding his salary from moneys received by him, or when settling or adjusting the accounts of any such officer, to require evidence that the taxes mentioned in this section have been deducted and paid over to the Treasurer of the United States, or other officer authorized to receive the same: *Provided*, That payments of prize money shall be regarded as income from salaries, and the tax thereon shall be adjusted and collected in like manner: *Provided further*, That this section shall not apply to payments made to mechanics or laborers employed upon public works:

And provided further, That in case it should become necessary for showing the true receipts of the Government, under the operations of this section, upon the books of the Treasury Department, the requisite amount may be carried from unappropriated moneys in the treasury to the credit of said account; and this section shall take effect upon salary and compensation for the month of March, 1867.

2 P. teg. p. 318

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1-197

In the Supreme Court of the United States.

DECEMBER TERM, 1872.

WILLIAM H. BARNES, JAMES N. KERNS, and ALBERT L. MAGILTON, *Plaintiffs in Error*, *vs.* THE PHILADELPHIA AND READING RAILROAD COMPANY.	No. 134.

In Error to the Circuit Court of the United States for eastern district of Pennsylvania.

BRIEF FOR THE PLAINTIFFS.

In the Supreme Court of the United States.

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In Error to the Circuit Court of the United States for eastern district of Pennsylvania.

BRIEF FOR THE PLAINTIFFS.

In addition to the brief heretofore filed upon behalf of the United States, we desire to submit other reasons for holding that a dividend declared by a railroad company on the 22d of December, 1869, payable January 17, 1870, is income for the *former* year, rather than for the *latter*.

The question may be regarded either as respects the stockholder or as respects the company.

I.

As regards the stockholder, the dividend becomes income when declared.

The *declaration* of a dividend, (1) severs it from the stock, (2) changes the interest of the stockholder in it, (3) makes it absolutely part of his personal estate, and

(4) gives a lien to any tax leviable on such stock, and payable out of dividends.

(1.) That such declaration makes a *severance* is shown by the case of Perry *vs.* Maxwell, 2 Dev. & Bat. Eq., (N. C.,) 488—where a testator bequeathed certain bank stock to a daughter, and directed his executors to receive the dividends and pay them to his daughter. At his death, certain dividends had been *declared*, but were unpaid. The question was whether the bequest covered these.

Chief Justice Ruffin says, that the dividends did not pass because "they had been severed from the stock by being declared. They were not profits accruing, but had accrued, and no more would pass then as parts of the stock, than a crop, made on land and gathered, would by devise of the land. Upon the transfer of the stock to a purchaser, dividends declared do not follow unless bargained for, and then the purchaser gets them in the name of his vendor."

It is true that the report does not show whether these dividends were also *payable* at the time of the death of the testator. The case is quoted to show the *principle* as ascertained by Judge Ruffin, than whom there are few greater names in Law on the Continent. His language is ordinarily very accurate, and he makes the *declaration* of the dividend the fact which changes its character.

(2.) That such *declaration* changes the position and interest of the stockholder otherwise, is manifest by the case of Carlisle *vs.* Southeastern Railway Company, 6 Rail. Cases, 670, (which we see in Redf. Rail. 2, 610,) where it is said that, after a dividend has been declared, the previous *joint* interest of the stockholders in the fund becomes *several*, and their previous *community* of interest is destroyed; so that a bill, (as in that case,) filed by one stockholder on behalf of all, seeking to enjoin the payment of certain dividends, on the ground that they had been fraudulently declared, was held maintainable only as to future undeclared dividends.

(3.) That the declaration of a dividend, *per se*, renders it absolutely thenceforth part of the personal estate of the shareholder, is shown by Lock *vs.* Venables, 27 Beavans, 598.

There a testatrix had bequeathed her "Carron Company" stock to her executors, in trust to pay to her niece for her life "the dividends, interest, and proceeds of such stock," &c., with other provisions as to the residue of her estate. The will was dated May 31, 1856, and the testatrix died May 29, 1858. On the 26th of May, 1858, a large *bonus* was declared upon the stock of that company, payable June 10, 1858.

A question was made as to the right of the niece thereto. The case seems to have been well argued.

The Court (Master of the Rolls) said:

> "In this case the *bonus* having been actually declared in the testatrix's life, though the right to receive it did not accrue until a somewhat later period, cannot be treated as part of the annual profits or proceeds which accrued after her death. It is part of her personal estate. It resembles the case of consols; the

dividends are declared on the 5th of January; they then belong to the owner of the stock; but practically they are not paid until two or three days after, and if the owner went on the morning of the 5th he would not get them.

"Here the *bonus* was profits of the stock accrued before the death of the testatrix, and was part of her personal estate in every sense of the term, though it was payable subsequently."

If this opinion be law, it controls the present case· It makes the dividend of December 22, 1869, part of the shareholders' income *at that time.*

We have referred to all the cases cited by the counsel who appeared in that case. None of them is upon all fours with it as regards facts. Some of them trace the history of the doctrine, now fixed, (2 Rop. Leg., 1342; 2 Redf. Wills, 469,) that no distinction, as regards the rights of the life-holder of stock, can be taken between an ordinary dividend and a bonus—a doctrine which it may be proper to bear in mind here. Nor have we been able, after examination, to find that the case was appealed.

We submit that its principle is consistent with that of the current of authority upon the subject.

(4.) That a tax upon stock, payable out of dividends becomes a *lien* upon such dividends from the time that they are declared, appears from the case of The State *vs.* Mayhew, 2 Gill, (Md.,) 487.

The court says there, in reply to an objection by counsel, "as soon as a dividend is declared, the right of the State to so much of it as is required to be paid on account of the tax is fixed and indefeasible, and overrides all other liens, claims, or rights, by whomsoever asserted, unless, perhaps, it were in conflict with a preferred claim of the United States."

We see nothing in the policy of the revenue law to render these principles inapplicable; rather, the contrary. The time for paying dividends that have been *declared* is a matter turning on the convenience of the corporation officials as much as upon anything. It may well be that the actual *payment* of the tax thereupon might be deferred in the same way. In the meanwhile the interest of the shareholder therein has accrued, and the corresponding interest of the United States may be allowed to accrue in the same way: *solvendum*, as to the shareholder, upon the 17th of January, 1870; as to the Government, upon regular tax day thereafter.

II.

But we submit that the machinery of the 122d section, under consideration, regards this income only *as respects the company.*

This *incidental* question is incidental to an elaborate provision in which the *company* is regarded and treated as the *taxpayer;* in which the *shareholder*, as regards two material questions, is expressly excluded from view, and, as regards all other questions that might arise, is also excluded by the very strong and peculiar language *whenever, and wherever*, and *to whatsoever party, the same may be payable;* which is to say, that in levying this tax it makes no matter when or where or to whom the dividend may be payable. The person spoken of as taxpayer is a railroad company, and the only category required to render a tax due from it is, that it "*may have declared a dividend;*" and then, by way of excluding all possibilities, it is added, in effect, no matter when, where, or to whom the dividend so declared may be payable. Why, then, should it make any difference here that a company, which upon the 23d of December, 1869, was in the category above, had made such dividend payable in the year to come?

The section looks to the circumstances of the company and not to those of the shareholder, whenever the difference is important; that is, whenever by such selection it will obtain revenue which otherwise it would miss. For instance, the cases of *the non-resident alien stockholder*, and *the stockholder with an income* of *less than* $1,000.

The policy, perhaps for similar reasons, is very much that of the feudal lord declining to look beyond the trustee or *terre tenant*, for his *services* and *incidents.*

In just the same way this section ascribes the income under consideration to the year, whether 1866, 1869, or 1870, in which it came to the hands of the company, without regarding the time of its being transferred to the shareholder.

Indeed, it seems as if no good reason can be given why the United States, upon resolving in such matters to deal with the company, should not fix upon the day when the income is ascertained and admitted to exist in the company's hands, as that when the tax is to attach. Such would be a less striking illustration of its purpose to look to the company alone, than is its refusing to see that a certain shareholder in such company is an alien non-resident; or that another has, upon the whole, an income of less than $1,000.

The machinery of the 122d section regards the company as the party owing the tax, and that construction will be most true which is consistent with this theory.

Let us now examine the words of this section and find how far its language leaves the point before us in doubt.

Its words are:

> "*That any railroad*, canal, turnpike, canal navigation, or slackwater *company*, indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company *that may have declared any dividend* in scrip or money *due or payable to its stockholders*, including non-residents, whether citizens or aliens, as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, *shall be subject to and pay a tax of five per centum on the amount of all such* interest, or coupons, *dividends*, or profits, *whenever and wherever the same shall be payable, and to whatsoever party the same may be payable*, including non-residents, whether citizens or aliens, and said companies are hereby authorized to deduct and withhold from all payments on account of any interest," &c.

The present is a case of a *dividend* payable by a *railroad* company, and no question is raised as to the manner in which it was made, or as to the character of the party (whether citizen or other) to whom the same is due. No part of the above extract is material, except what is in *italics*. Reading nothing but these, therefore, the section provides as to the case in hand—

> "That any railroad company that may have declared any dividend due or payable to its stockholders, shall be subject to and pay a tax of five per centum on the amount of all such dividends, whenever and wherever the same may be payable, and to whatsoever party or person the same may be payable."

We submit that the above section provides that railroad companies that may have declared dividends shall be subject to a tax of 5 per cent. thereon, no matter when, where, or to whom the same is payable. In other words, the tax attaches at the time the dividend is *declared*, without reference to time or place of payment, or to the person to whom payable.

That "whenever payable," does not mean that the tax attaches at the time of payment, seems clear upon mere inspection. But, in addition, if it means otherwise, the passage would necessitate the same meaning as to the *place* of payment. If, for instance, the place of payment for foreign shareholders were London, it would require the tax to be payable there, and the taxpayer might defeat a suit by the Government for such tax by showing that it was on deposit there.

But the effect of merely *reading* the expression "whenever, wherever, and to whatsoever persons," is stronger than any *argument* that can be made upon it, and excludes the idea that it signifies "at such time and place, and to such person." Therefore, when it had been declared in December, the fact that it was payable in January was of no importance, by *the* *express words* of the section itself. The time of payment can be resorted to for no purpose, and, therefore, certainly not for the purpose of purposes—that is, to show that the dividend was untaxable.

For the purposes of the Government, the dividend was *income* when *declared*, and, therefore, *income* of the *time* of such declaration, and *income* of the *place* of such declaration, and also, income attributed to the *party* who made the declaration, no matter to whom payable in the event. The railroad company is the taxpayer. The United States knows nobody else in the transaction. The party who is the real contributor of the 5 per cent. has no dealings with the Government, and is informed of his *loss* only through the medium of a settlement with his *trustee*.

GEO. H. WILLIAMS,
Attorney General.
S. F. PHILLIPS,
Solicitor General.

V

BARNES vs. THE PHILAD'A & READING R. R. CO.

DECEMBER TERM, 1870. No. 334.

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SAME vs. SAME.

DECEMBER TERM, 1870. No. 337.

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SAME vs. THE LEHIGH VALLEY R. R. CO.

DECEMBER TERM, 1870. No. 335.

◆

SAME vs. THE LAKE SUPERIOR & MISS. R. R. CO.

DECEMBER TERM, 1870. No. 336.

◆

Supplemental Brief of Defendants in Error.

Allen, Lane & Scott's Printing House, 233 South Fifth Street.

Barnes
vs.
The Philadelphia and Reading Railroad Company.
December Term, 1870.
No. 334.

Same
vs.
Same.
December Term, 1870.
No. 337.

Same
vs.
The Lehigh Valley Railroad Company.
December Term, 1870.
No. 335.

Same
vs.
The Lake Superior and Mississippi Railroad Company.
December Term, 1870.
No. 336.

SUPPLEMENTAL BRIEF ON BEHALF OF THE DEFENDANTS IN ERROR.

The original brief of the defendants in error was prepared without the counsel by whom it was prepared having had the opportunity of seeing the brief of the plaintiff in error, and without his having any certain knowledge of the points on which the case of the plaintiff in error was to be rested on the argument before the Supreme Court. It was supposed that the liability of the defendants in error would be insisted on, either—

1. *Because the general income-tax law which was in force on the 31st of December, 1869, remained in force until the expiration of the year 1870*, or, if such was not the case, then

2. Because the five per cent. tax chargeable on interest and dividends payable by railroads and certain other corporations, under the 122d section of the act of June 30th, 1864, entitled "An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes," (Stat. at Large, vol. 13, page 284,) as amended by the ninth section of the act of July 13th, 1866, (Stat. at Large, vol. 14, page 138. See also Brightly's Digest, vol. 2, page 364, pl. 302,) was a distinct and independent tax unconnected with the general income tax, without limitation as to time, and consequently continuing in force after the general income tax had expired; or, if the law were otherwise, then

3. Because the interest payable and paid by railroad companies on the 1st of January, 1870, and dividends payable and paid by railroad companies in the month of January, 1870, although declared in December, 1869, were to be treated as income of the recipients for the year 1869, and as taxable under the general income-tax law, which expired with the 31st of December, 1869; or, if none of the preceding points could be sustained, then

4. Because the seventeenth section of the act of Congress approved July 14th, 1870, entitled "An act to reduce internal taxes, and for other purposes" (16 Statutes at Large, page 256,) construed former statutory provisions, taxing interest and dividends paid by railroad companies, and certain other corporations, as being in force when the dividends and interest sought to be taxed in these cases were in force, and that this construction was binding on the courts.

The first point, viz., that the general income-tax law in force on the 31st of December, 1869, remained in force during the year 1870, is not adverted to in the brief of the plaintiff in error, and it may be assumed that it was considered untenable, and yet this point was greatly relied on by the commissioner of internal revenue at an early stage of the controversy in relation to these taxes. Thus, for example, in a written reply made under date of April 6th, 1870, to a communication which had been addressed to him on the subject of the assessment of these taxes, by a number of officers of railroad and canal companies, Mr. Delano, then commissioner of internal revenue, says, "You assume it to be conceded by this office that the present law imposes no tax upon the general income of 1870; that is not so; no such concession is made. The words 'eighteen hundred and seventy,' employed in section 119 of the act of June 30th, 1864, as amended by the act of March 2d, 1867, are understood to refer to the year of income and not to the year of assessment." The incorrectness of this view of the law is presumed to be now conceded; and it is difficult to understand how it ever came to be entertained. In the language used by an eminent senator,—in discussing a joint resolution which had been sent to the Senate by the House of Representatives, reciting that doubts had arisen and conflicting decisions had been made in the different departments of the Government in regard to the construction of the law relating to tax on incomes, and declaring it to be the true intent and meaning of the acts relating to that subject that all persons are liable to the payment of their proper income tax, accruing and to accrue for and during and up to the end of the year 1870, and that the assessment and collection of any such tax accruing in the year 1870, and remaining unpaid on the first day of January, 1871, may, under the existing provisions of law, be made in the said last-mentioned year,—"It would greatly surprise me if the capacity or ingenuity of any member of this body should rise so high as to achieve more unmistakable legislative language than that which puts an end to the income tax with the year 1869, when speaking of the year in which it was to accrue, and the year 1870, when specifying the two spring days when the levy of the tax is to accrue."

II. The second point is mainly relied on by the plaintiff in error. Indeed, it is the only point argued in his printed brief. It is proposed to review that argument as briefly as possible, avoiding, at the same time, as far as practicable, any repetition of the views advanced in the original brief of the defendants in error.

The plaintiff in error goes back to the first income-tax law, viz., the forty-ninth section of the act of August 5th, 1861, entitled "An act to provide increased revenue from imports to pay interest on the public debt, and for other purposes." (See Statutes at Large, vol. 12, page 208.) By that section there was levied "upon the annual income of every person residing in the United States, whether such income is derived from any kind of property, or from any profession, trade, employment, or vocation carried on in the United States, elsewhere, or from any other source whatever, if such annual income exceeds the sum of eight hundred dollars, a tax of three per centum on the amount of such excess of such income above eight hundred dollars." This tax was to be assessed upon the annual income of the tax-payers for the year next preceding the 1st of January, A. D. 1862 (*ibid.*), and by the fifty-first section of the same act, it was made payable on or before the 30th of June, 1862, and collectible by levy and sale at the expiration of thirty days from that date. As the law imposing this tax was repealed before the period when payment of the tax was enforceable, no tax was collected under it; and it is only important to advert to its provisions as affording some aid in the construction of the subsequent enactments by which it was supplied.

It is quite plain that income derived from the stock or bonds of railroad or other corporations was taxable under the act of 1861 only as part of the general income of the recipient; and this ~~another~~ is admitted in the brief of the plaintiff in error. We start, therefore, with the acknowledged fact that the original plan of Congress was to levy a tax upon income generally, without discriminating in any manner against income derived from investments in railroad bonds or stocks, or from salaries paid by the United States; and, *a priori*, we would not expect to find that Congress afterwards imposed a tax, of indefinite duration, upon income accruing from the stock or bonds of railroad or canal companies, or from the generally inadequate salaries of civil, military, or naval officers of the United States, while income from other sources was taxed for a comparatively short period of time. No reason could be assigned for anticipating such palpable injustice.

If it had been the policy of the country to discourage the investment of capital in the construction of railroads, canals, bridges, &c., or if the official salaries paid by the United States had been exorbitant in amount, it might have been otherwise; but it cannot be pretended that such ever was, or probably ever can be, the policy of this country, or that the strictest economy, or rather parsimony, has not regulated official compensation under the laws of the United States. But we are told that this unreasonable and unjust discrimination was actually provided for the income-tax law which superseded the act of 1861, and that it was continued in successive re-enactments until the expiration of the year 1869; and if this is so, it must be confessed that the policy of Congress has been singularly variable, since the first and last income-tax laws—viz., those of 1861 and 1870—make no attempt to continue the tax upon income derived from corporate investments, and from salaries, beyond the period of the tax upon income from other sources.

The act of July 1st, 1862, entitled "An act to provide internal revenue to support the Government and to pay interest on the public debt," is the first to be examined. Of this act it may be remarked that it is emphatically one in the construction of which the greatest allowance must be made for inaccuracy of language and want of method in arrangement. It would be easy to adduce many instances of the difficulties attendant upon a literal or strict construction of some of its various provisions. The extent of its subject, and the urgent necessity for its enactment, doubtless afforded but little opportunity for elaboration of details.

The argument that the tax which was imposed by the eighty-first section of this act on interest or dividends paid by railroad companies was intended to be, and was, an entirely separate and distinct tax from that imposed upon income generally by the ninetieth section, is based upon the relative position of the two sections, the difference in the rate of taxation, and the supposed express exclusion of the interest or dividends taxable under the former from the operation of the latter section; and, assuming that the conclusion contended for is the legitimate result of the line of argument indicated, there would seem to be no difficulty in adopting the further conclusion that the limitation of time prescribed for the tax under the ninetieth section was inapplicable to the eighty-first section.

In answer to this argument, it may first be said that it is irrelevant since the collocation and phraseology of the act of June 30th, 1864, by which the act of July 1st, 1862, was superseded, and which, although several times amended, continued to regulate the income tax until the 1st of January, 1870, are so entirely different from those of the earlier act, ~~and~~ that inferences drawn from the ~~[illegible]~~ mere letter and sectional arrangement of the act of 1862, are inapplicable to the act of 1864. Indeed, as will be shown hereafter, a comparison of the textual peculiarities of the two acts indicates very strongly that those of the latter act were adopted for the very purpose of excluding such inferences.

In the second place, the construction now attempted to be put by the internal revenue office on the act of 1862 was expressly repudiated by the same office when collecting the income tax under that act; and if the construction now contended for is correct, then immense sums of money have been wrongfully collected in the shape of income tax. That this may be clearly understood, it may be well to repeat the gist of the argument now made as to the construction of the act of 1862. It is said that the eighty-first section imposed a tax of three per cent. on interest and dividends paid by railroad companies, that by the very words of the ninety-first section, which imposed a tax of three per cent. on income over six hundred, provided that it did not exceed ten thousand, dollars, and a tax of five per cent. on income over six hundred dollars if it exceeded ten thousand dollars, income consisting of such interest or dividends was excluded from the income taxable under the ninety-first section, and that therefore the limitation applicable to the latter section was inapplicable to the former. That annual interest or dividends, even exceeding ten thousand dollars in amount, were taxable under the eighty-first section only, and at the rate of three per cent., and not under the ninetieth section, and at the rate of five per cent., was an inevitable deduction from this reasoning, and if the deduction was wrong, the reasoning was wrong also. But, the internal revenue office, from the very first, insisted that the tax of *five* per cent. was chargeable on income exceeding ten thousand dollars, whether derived from railroad dividends or interest, or any other source whatever, and that even where the entire income was derived from such dividends or interest, and had been taxed *three per cent.* under the eighty-first section, it was still taxable under the ninetieth section, although in adjusting the rate of taxation the three per cent. already paid was to be allowed.

Thus, in the "Regulations for the assessment of the income tax," issued by Commissioner Lewis, May 1st, 1863, the assessors and assistant assessors are instructed as follows:—"Whenever the total income of any person exceeds ten thousand dollars, and deductions are made therefrom upon the ground that a portion of such income has been subject to a three per cent. duty upon dividends or interest paid by companies, corporations, or associations, as before enumerated, such person will be subject to a tax of two per cent. additional upon so much of his income as may have been previously subjected to a duty of three per cent. by the officers of the companies, corporations, or associations before named." Estee's Excise Tax Law, page 299. So again, at page 302 of the same compilation, under head, "Regulations of the Commissioner, 24, income tax for 1862," it is said, "Every person in the first class (*i. e.*, residents in the United States and citizens residing abroad who are in the employment of the Government) will be taxed at the rate of five per cent. when the annual gains, profits, or income exceed $10,000, after the following deductions are made from the gross amounts returned, (as per table, page 2,) page 303 of this work, viz.:—

"1st. The $600 allowed by law.

"2d. Other national, State, and local taxes assessed for 1862, and paid.

"3d. Rent actually paid for the dwelling-house or estate occupied as the residence of the person assessed.

"4th. Necessary repairs to property yielding the income or insurance thereon, or pay for hired laborers, and their subsistence, employed in conducting his business, or interest on incumbrances upon the property, or all, as the case may be." "Whenever the taxable income of a resident in the United States, ascertained as above, exceeds $10,000, and upon a portion of said amount three per cent. has been withheld by the officers of companies, corporations, and associations, from interest or dividends thereon, due him, such income will be subject to a tax of two per cent. additional, upon so much thereof as may have been previously subjected to a duty of three per cent. by the officers of the companies, corporations, or associations aforesaid."

In Mr. Boutwell's "Manual of the Direct and Excise Tax System of the United States," page 210, will be found the views of the internal revenue office on this subject, set out at large in the following letter from Mr. McPherson, Deputy Commissioner of Internal Revenue:—

"SIR:—I have the honor to acknowledge the receipt of your letter, 7th instant, relative to the assessment of income tax. You make two points:

"1st. That the deduction of income from sources named in section ninety-one, on which a tax of three per cent. has been already paid, is to be made in ascertaining the amount of taxable income and the rate of tax thereon, and is then to be excluded from all further computation.

"2d. That there is no authority of law for requiring an additional two per cent. upon portions of income derived from the sources above named, when the taxable income of the person proves to be in excess of $10,000.

"I think you have not fully weighed the provisions of the law, or its manifest intent. Section ninety divides into two classes the taxable incomes of persons residing in the United States: one, whose annual gains, profits, or income exceed $600, and do not exceed $10,000, is liable to a duty of three per cent. on the excess over $600; the other, whose income exceeds $10,000, is liable to a duty of five per cent. on the excess over $600. Previous sections of the law impose a tax of three per cent on payments of interest and dividends by specified corporations, on salaries of United States officials, and on income derived from advertisements. Section ninety-one, in its first clause, provides 'that in estimating said annual gains, profits, or income, whether subject to a duty as provided in this act of three per centum or five per centum, all other national, State, and local taxes * * shall be first deducted.' In its second clause it provides that salaries or payments from the United States, and interest or dividends from banks and other corporations, the taxes on which shall have been assessed and paid by said banks and other corporations, and income from advertisements, upon which specific, stamp, or *ad valorem* duties shall have been assessed or paid, shall also be deducted.

"You hold that all the income from all these sources shall be first deducted in determining the taxable income and the rate of tax. I cannot see that the law justifies your opinion. It certainly does not so provide in terms. The ninety-first section gives to every person residing in the United States an absolute deduction of other national, State, and local taxes paid by him. The eleventh section of the act of March 3d, 1863, as if to make this distinction more emphatic, provides, 'that in estimating the annual gains, profits, or income of any person under the act to which this act is an amendment, the amount actually paid by such person for the rent of the dwelling-house or estate on which he resides shall be first deducted from the gains, profits, or income of such person.'

"This office has also authorized, as by the equity of the statute, a deduction, in this as in all cases, of necessary repairs, &c., upon the property yielding the income. These comprise all the deductions authorized by law or equity to be made in determining the amount of taxable income and the rate of tax. The second clause of section ninety-one, which is wholly independent of the first, is distinct in form, and on no reasonable construction can be made to mean more than it expresses, authorizes the deduction of incomes received from the other sources therein named, but for a reason expressed therein, viz., that the taxes due thereon have been assessed and paid. This interpretation exhausts the phraseology, and gives the reason for the deduction—not as a means of determining the rate of tax, but to avoid re-imposition of three per cent. tax. Your claim ignores facts, and assumes, what cannot be granted, that there is but one class of deductions. There are two. One consists of those which are absolutely exempt from taxation, without reference to the amount of income, and which are first deductions, and are made in estimating the income and the rate of tax. The other consists of those which have been already taxed, which may be taxed an increased rate in case the taxable income exceeds $10,000, and which are simple deductions, either absolute or contingent, as the case may be.

"Your construction, besides not being literal, would have the obviously unjust effect of relieving from five per cent. taxation one class of citizens whose chief sources of income are made taxable under section ninety-one, and of imposing five per cent. on the same amount of income derived from rents, professions, trades, commerce, and stocks and bonds not reached by section ninety-one. This, surely, cannot be considered the intent of Congress, whose division of income, of all persons residing in the United States, is into two great classes, with a rate of taxation proportioned thereto, and whose fundamental idea is, or should be, equality of taxation upon the citizens.

"There is one other consideration which bears heavily against your construction. Congress imposed a duty of one and a half per cent. on that portion of income derived from United States securities, but that source of income is not named in section ninety-one among those to be deducted. Hence, were your construction correct, the patriotic citizen with a gross income exceeding $10,000, one-half of which is derived from United States securities, would be placed at a disadvantage, and made to pay five per cent. on the remainder, while another with like gross income, one-half of which is derived from the sources named in section ninety-one, which you propose to deduct in ascertaining the taxable income and the rate of tax, would escape with but three per cent. on the remainder. And this, too, while Congress at every point manifestly sought to put the holders of Government securities in a better position than any other class of citizens. Your construction must be wrong, or Congress has wholly failed to do what it manifestly and in the clearest language intended.

"The construction of this office is natural and reasonable. It is in harmony with the general scope of the law. It is reasonable, in placing upon one footing all residents of the United States whose taxable incomes are over $10,000, and in maintaining the broad distinction of rate expressly enacted in section ninety, and in harmonizing that with the merely directory provisions of section ninety-one.

"Where taxable income is ascertained to be in excess of $10,000, it becomes liable to a five per cent. tax, and must be made to bear it, whatever its sources. If some of them have already paid three per cent. at the hands of corporations paying interest or dividends, or otherwise, two per cent. additional must be imposed upon them as a necessary means, and the only practicable means, of carrying out the mandatory provisions of the law. To fail to require this, would be to make the law an engine of inequality and oppression. This, I am sure, you are too good a citizen to desire.

"I am, very respectfully, your obedient servant,

"EDWARD McPHERSON,
"*Deputy Commissioner.*"

From these citations it will be seen that even under the act of 1862 the internal revenue office always held that the tax upon income was imposed by the general section relating to income, and that the retention of three per cent. from that portion of the income collectible from certain corporations was but a *mode* of collecting the whole, or part, as the case might be, of the tax chargeable under the general section. How otherwise could a tax of *two per cent. additional to the three per cent. already deducted* be levied on income derived from railroad bonds or stocks when such income exceeded the sum of $10,000? and how otherwise could income derived from such securities be taxed, supposing that the officers had neglected to retain the three per cent. and the company had become insolvent? It is to be remembered that the deduction of such income authorized to be made by the ninety-first section, in estimating the annual gains, profits, or income, whether subject to a duty, as provided in the said act, of three per centum or of five per centum, was authorized to be made only when the tax on such income had been *assessed and paid* by the corporation; but if no tax had been assessed and paid by the corporation, and if none could be collected, it will hardly be contended that the income was untaxable, and yet no tax could have been imposed except under the section taxing income generally. So, too, as to the vast amount of income which accrued from corporation stocks and dividends during the year 1862, before the first day of September, 1862, the date when—by the joint resolution of July 17th, 1862, of the two Houses of Congress (12 Stat. at Large, page 627) and the notice from the Treasury Department, of July 23d, 1862 (Estee, page 100)—the act of July 1st, 1862, went into effect); and, consequently, before the retention of three per cent. therefrom became practicable, the tax thereon was collectible and was in fact collected only on the theory that the ninetieth or general income-tax section of the act of 1862 applied to such income as well as to income from all other sources. The regulation of Commissioner Lewis (Estee, page 300) was, that the tax must be levied upon all dividends declared prior to September 1st, 1862, and upon "$600 of all salaries of officers or payments to persons in the civil, military, naval, or other service of the United States, for services rendered prior to said date, as such dividends and proportion of salaries were not subject to deduction or assessment."

It may be remarked, in the last place, of the act of 1862, that the construction given to it by the commissioner of internal revenue was an official and authoritative construction; that it was acquiesced in by the legislative department and by the people generally; that it was that contemporaneous construction, which is said to be *fortessima in lege;* that taxes to an immense amount were collected under it, and that it was consistent with the theory that uniformity and equality of taxation were intended by Congress. The verbal difficulty arising from the ninety-first section, providing that, in estimating the annual income subject to a tax of either three or five per cent. interest, or dividends paid by certain corporations and already taxed, should be deducted, disappears if it is assumed (as it fairly may be) that Congress intended that the deduction should be made absolutely; only when the total income was subject to the same rate of tax as had already been paid on such interest and dividends; but that when the total income was subject to a higher rate of tax the deduction should be made only for the purpose of relieving the said interest and dividends from a re-assessment of the portion of the higher rate which had already been paid. The same observation applies to the deduction to be made under the ninety-first section for salaries above $600, from which, under the eighty-sixth section, a tax of three per cent. on the excess over $600 was to be retained when they were paid; and as it happens that any illustration applicable to the taxation of salaries is also applicable to the taxation of interest or dividends paid by railroad companies and certain other corporations, it may not be unimportant to note what would have been the practical operation of the theory that the tax on salaries was intended to be entirely distinct from that levied on income generally. As an example, let it be supposed that A had an income of $2400, consisting of a salary of $1800 from the United States, and of $600 from other sources, we would then have had $1200 of the salary taxable indefinitely under one section of the law, and the remaining $600 of the salary, forming part of income which, under another section of the law, was taxable until the year 1866; and if the surplus of A's income over the salary instead of being $600 had been $10,000, the result would have been that $1200 of the salary would have been taxed at the rate of three per cent., and $600, although specially excluded from taxation by the eighty-first section, would have formed part of income taxable at the higher rate of five per cent. under the ninety-first section. These anomalies are avoided by adopting the construction put upon the act by the internal revenue office.

The plaintiff in error next proceeds to consider the act of June 30th, 1864, entitled "An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes" (13 Stat. at Large, page 223); but considers its various provisions bearing on the questions before the court, not as they were originally enacted, but as they were from time to time amended. It is believed that a better understanding of the subject will be attained by examining the act as it was originally passed, and comparing its provisions with those which preceded, and then tracing step by step the subsequent alterations.

The act of June 30th, 1864, was obviously intended to replace as far as possible all previous enactments on the subject of internal revenue. It superseded and repealed every provision of the act of July 1st, 1862, hereinbefore especially adverted to, and must be presumed to have been passed with a full knowledge of the difficulties which had arisen under the act of 1862, and of the controversies between the tax-payers and the commissioner of internal revenue in regard to the very question of the taxation of income derived from investments in the lands or stocks of certain corporations. Under these circumstances any change in the structure or phraseology of the act of 1864, as compared with the act of 1862, may *prima facie* be expected to have a peculiar significance.

The sections in the act relating to income, no matter from what sources derived, begin with the 116th and end with the 122d, and are all arranged under the general head of "income."

The 116th section provides for the levy and collection of tax graduated according to the amount of income on all income over six hundred dollars, viz., five per cent. "on the excess over six hundred dollars and not exceeding five thousand dollars," seven and a half per cent. "on the excess over five thousand dollars and not exceeding ten thousand dollars," and ten per cent. "on the excess over ten thousand dollars." The tax thus graduated was imposed "upon the annual gains, profits, or income of every person residing in the United States, or of any citizen of the United States residing abroad, whether derived from any kind of property, rents, interests, dividends, salaries, or from any profession, trade, employment, or vocation carried on in the United States or elsewhere, or from any other source whatever, except as hereinafter mentioned."

The 117th section provided that, in estimating the annual gains, profits, or income, certain deductions should be made, among which were, in addition to $600: (1) the excess over $600 of official salaries; and, (2) the income derived from dividends on shares in the capital stock of any bank, trust company, savings institution, insurance, railroad, canal, turnpike, canal navigation or slack-water company, and the interest on any bonds or other evidences of indebtedness of any such corporation or company, which shall have been assessed and paid as hereinafter provided." Provision was also made for *including* in the estimate, salary or other compensation paid to any person in the employment or service of the United States, when such compensation should not exceed $600 per annum, or should be paid by fees, or should be uncertain or irregular in amount, or in time. (And here it may be remarked that this clause shows by express and affirmative direction that the previous section was intended to operate upon salaries, although provision was made against double taxation of a portion of such salaries; and it may be remarked, also, that it is to the last degree improbable that Congress intended that official compensation by salaries of fixed amount should be taxed permanently, while official compensation paid by fees (generally much more lucrative than the former) should be taxed only during temporary duration of the general income tax.)

The 118th and 119th sections relate to the manner of making returns and collecting the tax thereon. The 120th section imposes a duty of five per centum "on all dividends in scrip and money thereafter declared due; and whenever the same shall be payable to stockholders, policy-holders, or depositors as part of the earnings, income or gains of any bank, trust company, or savings institution, and of any fire, marine, life, inland insurance company, either stock or mutual. * * And on all undistributed sums, or sums made or added during the year to their surplus or contingent funds;" and authorizes "said banks, trust companies, savings institutions, and insurance companies," "to withhold from all payments made on account of any dividends or sums of money that may be due and payable as aforesaid, the said duty of five per centum."

The 121st section declares that any bank, legally authorized to issue notes as circulation, which shall neglect or omit to make dividends or additions to its surplus or contingent fund as often as once in six months, shall make a return on the first day of January and July in each year, or within thirty days thereafter, of the amount of profits which have accrued or been earned and received by said bank during the preceding six months, and pay a tax of five per centum on such profits; a proviso, however, being added, "that when any dividend is made which includes any part of the surplus or contingent fund of any bank, trust company, savings institution, insurance, or railroad company, which has been assessed, and the duty paid thereon, the amount of the duty so paid on that portion of the surplus or contingent fund may be deducted from the duty on such dividend."

The 122d section provides, "that any railroad, canal, turnpike, canal navigation or slack-water company, indebted for any money for which bonds or other evidences of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest; or any such company that may have declared any dividend in scrip or money, due or payable to its stockholders as part of the earnings, profits, income or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a duty of five per centum on the amount of all such interest or coupons, dividends, or profits, whenever the same shall be payable;" and that the said companies "shall be authorized to deduct and withhold from all payments on account of any interest, or coupons and dividends, due and payable as aforesaid, the duty of five per centum."

The 123d section makes provision for levying a tax of five per centum upon the excess above six hundred dollars of salaries paid by the United States, and for the deduction of the said tax by the disbursing officers charged with the payment of such salaries.

The argument founded on the fact of the arrangement or order of these sections being in exact accordance with the theory that the 116th section imposed the tax, the 117th provided for its adjustment, and the following sections for its collection, is adverted to in the brief already filed on behalf of the defendants in error. This arrangement or order was entirely different in the act of 1862, since there the section which provided for the retention of a three per cent. tax from railroad stocks or dividends was the first in order of the sections relating directly or indirectly to an income tax, and was divided from the general income-tax sections by several sections, some of which had no possible connection with an income tax. Of these intervening sections, the eighty-second related to the deduction of a tax from dividends paid by banks, trust companies, savings institutions, and insurance companies, and to the charge of a tax on sums added to their surplus or contingent funds; the eighty-third, to any list or return to be made by a railroad company; the eighty-fourth, to a tax on gross receipts of certain insurance companies; the eighty-fifth, to the quarterly returns of insurance companies other than life insurance companies; the eighty-sixth, to a deduction of three per cent. from all salaries of United States officers exceeding $600 in amount; the eighty-seventh, to a tax on passports; and the eighty-eighth, to a tax on sums received from advertisements; and then follow the sections relating to the general income tax, viz., those from the eighty-ninth to the ninety-third, both inclusive.

The headings, too, under which these different sections are grouped, are as follows:—

" *Railroad companies or railroad corporations.*

" *Banks, trust companies, savings institutions, and insurance companies, salaries of officers and payment to persons in the service of the United States.*

" *Passports.*

" *Advertisements.*

" *Income duty.*"

While, as before mentioned, the sections of the act of 1864, from the 116th to the 122d, both inclusive, are grouped under the single head of "*income.*"

It will be noticed also, that while the act of March 3d, 1863, had already amended the ninety-first section of the act of 1862 by striking out from the list of deductions allowed in making an estimate of the income for which the tax-payer was to be directly liable, gains from interest or dividends paid by *gas companies*, and from *manufactures* on which specific stamp or *ad valorem* duties had been assessed, (see 12 Stat. at Large, page 718,) the 117th section of the act of 1864 still further diminished the list of deductions by omitting gains from *bridge*, *express*, *telegraph*, *steamboat*, and *ferry companies*, and also gains from *advertisements*. This, no doubt, was done with the intention of excluding from the estimate of the tax-payer's direct income tax any allowances except such as were based on the previous indirect payment of income taxes. A tax-payer was not to be credited with the payments of a tax on his gross receipts from advertisements, because such a tax was not in any sense an income tax. Neither was he to be allowed any deduction on account of income derived from dividends or interest paid by the companies last-above enumerated, since such interest or dividends were not diminished by a tax before being paid to him. In fine, the only deductions that were allowed for in income derived from interest or dividends paid by corporations were for income on which the recipient's income tax had either wholly or partially been paid through the agency of the corporations themselves.

It is respectfully submitted, that these modifications of the structure and language of the act of 1862 strongly indicate an intention on the part of Congress to make the act of 1864 conform to the official construction which had been put on the act of 1862, and to remove any textual difficulty which might be supposed to conflict with that construction.

The views entertained by the counsel for the defendants in error as to the proper construction of the act of 1864, irrespective of the light afforded by previous legislation in *pari materia*, have already been presented in the original brief, and need not be here repeated.

The plaintiff in error attaches great importance to the fact that the 117th section, as subsequently amended, when making provision "for estimating the gains, profits, and income of any person," prescribes what shall be excepted from the estimate, and that "the amount of income received from institutions or corporations whose officers, as required by law, withheld a per centum of the dividends made by such institutions, and pay the same to the officer authorized to receive the same," is included in the exception; and he argues with the emphasis of italics, that "*whatever income, therefore, may be excepted from that estimate under the authority of the 117th section cannot properly be regarded as comprehended by the 116th section*, or, in other words, as constituting income on which a duty is imposed by the latter section."

The plausibility of this argument will be increased, so far as it relates to the act of 1864, by considering the 116th and 117th sections as originally passed—since the unamended 116th section imposed an income tax on all sources of income "except as hereinafter mentioned," a phrase which was omitted by the subsequent amendment of the section—and it may well be contended that, as well by the 116th as by the 117th section, dividends and interest taxed before their receipt were excepted from the operation of the tax imposed by the 116th section.

But the same peculiarity existed in the corresponding sections of the superseded act of 1863; and, as has already been shown, the commissioner of internal revenue construed the general income-tax section as imposing the tax on all dividends and interest, and the section providing for the retention of a tax of three per cent. by the officers of certain corporations as a mode of collecting a part or the whole, as the case might be, of the recipient's tax. The considerations which are thought to support that construction have already been stated.

The argument of the plaintiff is a superficial one. It sticks in the Crib of the words of the act and does not penetrate into its spirit and meaning. It assumes that Congress intended to impose a tax of ten per cent. on the excess on income over ten thousand dollars, when that income was earned by the personal industry of the tax-payer, and a tax of but five per cent. when the income accrued from capital invested in the stocks or bonds of certain corporations.

But the argument is susceptible of another answer, and one that seems to indicate very clearly the intention of Congress in regard to this matter. Before any income tax had been collected under the act of 1864, the 116th and 117th sections were amended and made to provide that income received from the corporations in question should not be excluded, but *included*, in estimating taxable income. The words of the amended 116th section are, "and in ascertaining the income of any person liable to an income tax, the amount of income received from institutions whose officers as required by law withheld a per centum of the dividends made by such institutions * * shall be included, and the amount so withheld shall be deducted from the tax which would otherwise be assessed upon such person." (See 13 Statutes at Large, p. 479.) And the amended 117th section provides for the inclusion of interest upon all bonds, notes, and mortgages, or other forms of indebtedness bearing interest, and the tax-payer's share of the gains and profits of all companies. (*Ibid.*)

Now, can it be said that when the Congress passed the act of 1864, they meant to ignore the established construction of the act of 1862, and to exclude certain dividends and interest from taxation under the general income-tax section; that when they passed the amendatory act of 1865 they meant to include the same dividends and interest within the operation of that section; and that when, by subsequent legislation, they partially restored the provisions of the act of 1864, on this subject, they meant to leave the matter in doubt?

Such a vacillating policy should not be imputed to Congress if the apparent verbal inconsistency of the several acts can otherwise be explained—and the explanation is at hand. Until the passage of the act of 1865 the construction of the existing income-tax law had always been that the general section applied to all income, and that an income which, under the general section, would be subject to a tax of ten per cent., could not escape with a taxation of but five per cent. because it consisted of interest or dividends from which but five per cent. was authorized to be deducted before they were paid to the bondholders or stockholders to whom they were payable. The mere words of the law certainly afforded a pretext for an argument against this construction, and nothing can be more probable than that, by the amendatory act of 1865, Congress intended to remove this pretext and to express clearly the intent and meaning of the pre-existing statute. But when, by subsequent legislation, the income tax, instead of being graduated according to the amount of income, was fixed at a certain uniform rate, and that rate was the same as the rate of the tax required to be retained from interest or dividends, it became a matter of no importance whether the income from such interest or dividends was deducted from the general taxable income of the tax-payer, or whether the tax on such interest or dividends was deducted from the tax on the general taxable income; and for this reason, no doubt, it happened that in the legislation subsequent to 1865, by which the tax specially collectible from interest or dividends and the general income tax ~~was~~ were fixed at the rate of five per cent., the 116th section was left without any special provision for either including or excluding income from interest or dividends, and the original provision in the 117th section for excluding such income from the estimate of the tax-payer's income was restored.

But the plaintiff in error finds a confirmation of his theory, that the tax retainable under the 122d section from certain interest or dividends was not a part of, but an entirely different tax from that imposed by the 116th section, in the consideration that "*the two sections do not altogether coincide as to the persons affected by the tax*, and that in this respect the provisions of section 116, so far as they relate to income derived from interest, dividends, &c., are much narrower in their bearing and operation than the provisions of section 122 imposing a duty upon railroad dividends, &c.;" and as evidence of this, he points to the fact that under the 116th section it is only persons residing in the United States, and citizens of the United States residing abroad, whose income, when derived from interest or dividends, is liable to taxation; while under the 117th section the tax is chargeable on interest and dividends to "whatsoever party or person the same may be payable, including *non-residents*, WHETHER CITIZENS OR ALIENS."

Here, as before, the plaintiff in error speaks of the 122d section of the act of 1864, as amended; but the weight due to his argument will be better appreciated by first considering the 116th as well as the 122d sections of the act as it was originally passed, and then examining the occasion and effect of any change caused by subsequent amendments.

As the act was originally passed, the only income taxable under the 116th section was that either of a person residing in the United States, or of a citizen of the United States residing abroad; and in the 122d section no reference whatever was made to the residence or citizenship of the bondholders or stockholders from whose interest or dividends the tax of five per cent. was to be withheld. The amendments introduced by the act of March 3d, 1865, (13 Statutes at Large, p. 479,) already referred to, made no change in this respect. Such being the condition of the law, Chief-Justice Chase decided, in the case of Jackson *vs.* The Northern Central Railway Company, that no tax was retainable under the 122d section from interest or dividends payable to an alien, because the income of an alien was not taxable under the 116th section. "It is clear, also," said the Chief Justice, "that Congress regarded the duty on dividends directed to be withheld by the officers of the companies paying them, and to be paid over by them to the proper officers of the Government, as an income tax to be paid only by citizens or residents of the United States."

The fact that Congress regarded the duty on dividends in this light, aids materially in the construction of the 122d section of the internal revenue act, which is mainly relied upon by the defendant. This section subjects all railroad, canal, turnpike, canal navigation or slack-water companies to a duty of five per centum on all interest and dividends derived from their bonds or shares, and authorizes them to withhold that amount from bondholders or shareholders, and makes payment to the Government a discharge to that extent from payment to them. The language is general; and, if the section stood alone, an argument of some force might be drawn from it that Congress intended to impose an income tax on interest and dividends from such bonds and shares without reference to the citizenship or residence of the holders. But the section does not stand alone. It must be considered in connection with other parts of the act, and the 116th section, as we have already observed, regards dividends subject to deduction by the officers of the companies as paying them as income, not taxable except when payable to citizens or residents.

It is impossible to ascribe to Congress a different intention in regard to interest. Sound principles of construction require us to regard this section as simply providing for the cheap and efficient collection of the tax on incomes derived from the bonds and shares of the companies described, and not at all touching the number or classes of income-tax payers. The interest and dividends on which the duty is thus collected must be regarded as the same interest and dividends on which a duty is imposed by the 116th section, and as subject to duty only when held by citizens or residents of the United States.

This decision was soon followed by an act amendatory of the law as it stood when the decision was made; and, if Congress had so intended, it would have been very easy to provide in the new enactment against the possibility of the tax on dividends and interest being thereafter construed as being a part of the general income tax. In an official communication, dated April 6th, 1869, from Mr. Commissioner Delano, on the subject of the effect of the judgment of the Supreme Court, affirming the Chief Justice's opinion, he says, after referring to the terms of the statute in force when that opinion was delivered, that "Congress was then engaged upon the bill which was afterwards passed and became the act of July 13th, 1866," and then proceeds to show that the decision of the Supreme Court was inapplicable to the sections of that act. But why was it inapplicable? Not because Congress had so modified the law as to dissever all possible connection between the 116th and 122d sections, but because Congress, while ~~fully~~ implied recognizing and endorsing the correctness of the view taken by the Chief Justice of the relation between the should

two sections, had provided that the income tax ~~should~~ (levied by the 116th section) be imposed "upon gains, profits, and income of every business, trade, or profession carried on in the United States by persons *residing without the United States and not citizens thereof*," and that the tax (collected under the 122d section) should be retained from the dividends and interest therein mentioned whenever and "*wherever*" the same shall be payable, "*and to whatsoever party or person the same may be payable, including non-residents, whether citizens or aliens.*" See act of July 13th, 1866, 14 Statutes at Large, pages 138, 139.

Now, it may be conceded that the words, "gains, profits, and income of every business, trade, or profession carried on in the United States by persons residing without the United States, and not citizens thereof," are an inapt description of income derived by a foreigner from dividends or interest paid by corporations in the United States; but accuracy of language is certainly not to be found in the statutes relating to the internal revenue; and, at all events, it is sufficiently clear that when, in consequence of the decision of Chief-Justice Chase, it was thought advisable to make the 122d section apply to the income of foreigners, the 116th section was also made applicable to the income of foreigners. This seems to be ~~a~~ legislative recognition of the correctness of the theory of the Chief Justice's decision.

[illegible]

But even if the 122d section alone had been modified, the conclusion drawn by the plaintiff in error could not have been sustained. The only legitimate inference that could be drawn from such a state of facts would have been that Congress did not intend to render the decision of the Chief Justice imperative so far as the principle—the *ratio decidendi*—was concerned, but to provide against the effect of that principle in a particular case; in other words, to provide that the scope of the 122d section should be enlarged so that it might be made the means of collecting a tax in addition to that imposed by the 116th section, as well as of collecting the tax imposed by that section.

It will have been observed that in what has been said, the material amendments of the act of 1864, down to and including those made by the act of June 13th, 1866, have been incidentally considered, it will not be necessary, therefore, to refer to them specially again, except for the purpose of again calling the attention of the court to the circumstance, that until the passage of the act of March 2d, 1867, the very words of the law required that income from interest and dividends should be *included* in the general income returns, and that the tax already paid from time to time during the year on these dividends and interest should be deducted from the tax chargeable on such general returns.

But when, by the act of March 2d, 1867, (14 Statutes at Large, page 477,) the 116th section was again amended, and the income tax was fixed at the rate of five per cent. on income of any amount exceeding one thousand dollars, the clause specially and specifically requiring "the amount of income received from institutions whose officers, as required by law, withhold a percentum of the dividends made by such institutions, and pay the same to the commissioner of internal revenue," to be included, was dropped, and at the same time the 117th section was amended so as to provide that, in estimating the various items of the income of each tax-payer, there should be excepted "the amount of income received from institutions or corporations whose officers, as required by law, withhold a per centum of the dividends made by such institutions, and pay the same to the officer authorized to receive the same." These peculiarities have already been adverted to. Can it be possible that, in adopting them, Congress intended to make the tax on certain dividends and interest (and salaries also, for they stand in the same predicament) a permanent tax? Is nct the simple explanation that, as the rate of tax was made uniform, it was a matter of mere clerical convenience that the income and dividends should be deducted from the gross amount of income, instead of the particular tax being deducted from the gross tax?

The 116th and 117th sections, as thus amended, remained in force up to and including the thirty-first day of December, 1869; and it is respectfully submitted that the 122d section, which was last amended by the act of July 13th, 1866, (14 Stat. at Large, page 138,) expired with them.

There is yet another view of the relation between the 116th, 117th, and 122d sections which seems to show conclusively that the tax collectible under the 122d section was the identical tax imposed by the 116th, and it is thus:—

The 116th section, as last amended, provided "that there shall be levied, collected, and paid annually, upon * * annual gains, profits, and income, * * * whether derived from any kind of property, rents, *interests, dividends*, or salaries, or from any profession, &c., or from any other source whatever, a tax of five per cent.;" and the 117th section provided that "in estimating the gains, profits, and income * * there shall be *included* all income derived from * * * * *interest received or accrued upon old* [*all*] *notes, bonds, and mortgages, or other forms of indebtedness, bearing interest,* * * the amount of all premium on gold and *coupons,* * * * *all other gains, profits, and income derived from any source whatever*, except the rental value of any homestead used, &c., and the *share* of any person in the *gains and profits of all companies, whether incorporated or partnership, who would be entitled to the same if divided, whether divided or otherwise, except the amount of income received from institutions or corporations whose officers as required by law withhold a per centum of the dividends made by such institutions;*" but the 117th section did not provide for any deduction or exception of *interest* received from corporations whose officers were required to withhold a tax. Now it seems quite plain that if the tax retainable from such *interest* was an entirely *different* tax from that imposed by the 116th section, it was subject to *both* taxes, viz., that imposed by the 116th section, and that imposed by the 122d, or other similar section. The 116th section, both by comprehensive and specific terms, extended to "*interests;*" the 117th section specifically required interest on all notes, bonds, mortgages, or other forms of indebtedness to be included in the estimate, making no exception whatever of interest from which a tax had already been held; and the 122d section required a tax of five per centum to be withheld from dividends and interest paid by railroads and certain other corporations. If then it be assumed that this latter tax was not the tax imposed by the 116th section, how is it possible to resist the conclusion that both taxes were collectible?

The same argument holds good as to the sections of the act of 1864, as amended by the act of March 3d, 1865; and its force is strengthened by the fact that the act of 1864, as originally passed, expressly provided, in the 117th section, for the deduction, not only of dividends, but "interest on any bonds or other evidences of indebtedness" on which a tax had been paid.

The conclusion of this argument would seem to indicate indisputably that the premise that the taxes were different taxes must be false.

If the considerations heretofore presented in this and the original brief are sufficient to establish that the tax collectible under the 122d section was that imposed by the 116th section, nothing more need be said. They certainly cannot be shaken by any argument founded on the circumstance that the 119th section provided that the taxes on incomes therein imposed should be levied on a day some time subsequent to the close of the income year. Undoubtedly the taxes referred to were the aggregate taxes imposed by the act, or, in other words, the aggregate tax imposed by the 116th section; but this aggregate tax was subject to deductions or credits for partial payments made during the year. It is begging the question to say that these partial payments were not made on account of the tax imposed by the 116th section; but the same fallacy cannot be imputed to the defendants in error, if they have heretofore succeeded in showing that the payments were made on that account. But besides, as already shown, the words alone of the 116th and 117th sections, as applicable to income tax for the years 1864, 1865, and 1866, prove that the tax leviable in the spring of the year succeeding that during which the income tax accrued, literally required that the levy to be made under the 119th section should extend to the entire income, including corporate interest and dividends, although, in adjusting the levy, a credit was to be allowed for the tax already paid on such interest and dividends; and when, by merely formal alteration, these words were made to conform to some extent to those used in the act of 1862, the meaning and intent of the law was not changed. We have already seen that under the act of 1862 the tax was levied on all dividends and interest received from railroad companies and certain other corporations prior to September 1st, 1862, the day when the provision for deducting a tax from such interest and dividends took effect. It is as difficult to understand the argument based on the proviso to the amended 119th section of the act of March 2d, 1867. The proviso reads "that the tax on incomes for the year 1866 shall be levied on the day this act takes effect." What other meaning can this have than that the second day of March should be substituted for the first day of May?

But this branch of the case has already been fully considered in the original brief of the defendants in error.

But little need be said on the question whether Congress, in enacting the act of July 14th, 1870, (16 Stat. at Large, 256,) really thought that the tax collectible under the 120th, 122d, and 123d sections of the act of 1864 continued after the expiration of the annual income tax imposed by the 116th section. If they thought so, and presumed that they had reasonable ground for their belief, the probability is that they would have left the question to the decision of the courts, and not have provided, as they did by the seventeenth section of the act of 1870, "that sections 120, 121, 122, and 123 of the act of June 30th, 1864, entitled, &c., as amended by the act of July 13th, 1866, and the act of March 2d, 1867, shall be construed to impose the taxes therein-mentioned to the first day of August, 1870; but after that date, no further taxes shall be levied or assessed under said sections." Perhaps it would not be a great mistake to guess that the framer of this section meant to prescribe the rule of construction by which these and other similar cases then pending, or likely to arise, were decided; but the debates in the two houses of Congress, and the results of these debates, both in regard to the bill which afterward became the act of July 14th, 1870, and in regard to a joint resolution introduced soon after the 1st of January, 1870, in consequence of the deduction of five per cent. from salaries having been discontinued in the War Department, but continued in the civil service, show quite plainly that Congress considered the tax on dividends and interests an inseparable part of the general income tax.

Indeed, the very mode originally taken to validate the construction, then for the first time adopted by the internal revenue office, viz., that the tax on dividends and interest and that on salaries were not parts of the general income tax imposed by the 116th section, was to present a joint resolution declaring it to be the true intent and meaning of the acts relating to the subject, that all persons are liable to the payment of their proper income tax accruing and to accrue during the year 1870. When this joint resolution was introduced into the House of Representatives, the chairman of the committee of ways and means caused to be read a communication from the commissioner of internal revenue, containing the following paragraph:—

"It is contended that the tax imposed upon dividends, coupons, salaries, &c., by sections one hundred and twenty, one hundred and twenty-two, and one hundred and twenty-three of the same act, is simply part and parcel of the income tax of the individual stockholders, bondholders, or employees; and that, inasmuch as under existing laws no tax is imposed upon incomes of 1870, none should be withheld and paid upon dividends, salaries, &c., of the current year. There are, I think, certain *dicta* of the Supreme Court of the United States, implying that the tax upon the coupons of a railroad company's bonds is a part of the income tax of the bondholder.

"In view of the foregoing, I would respectfully suggest whether some early legislation may not be necessary and desirable to remove all doubt respecting the legal right to assess taxes upon dividends, coupons, salaries, &c., accrued or earned since the 31st ultimo."

This extract was made, not only to show the difficulty complained of, and the mode by which it was proposed to be cured, but for the purpose of contrasting it with the following extract from an official communication, dated June 28th, 1869:—"My position [*i. e.*, that the tax on dividends was not a tax on the corporation, but on the individual stockholder] seems to be fully sustained by the Supreme Court of the United States, in the recent case of the Northern Central Railway Company *vs.* John G. Jackson, (Internal Revenue Record, vol. 9, page 139,) in which the decision of the circuit court, to the effect that the payment by said company of five per cent. upon its interest coupons, and the withholding the same from the bondholder, was simply the method of collecting this portion of the bondholders' income tax, was sustained."

The following extracts from the *Congressional Globe* report of the debate on the act of July 14th, 1870, will show the opinion on this question of the chairman of the finance committee (Senator Sherman), who had the bill in charge:—

"Mr. Sherman.—On page 77 the senator will find the following clause:—

"That there shall be levied and collected annually a tax of three per cent. upon the gains, profits, and income of every person residing in the United States, &c.

"That one section is the operative section of the income-tax part of the law. Then there is the mode of collecting, first, the personal income, collected in a certain way; then the tax on incomes received from corporations collected in a certain way. But this one section is the operative section of the income-tax part of the law. That being stricken out, as a matter of course, the whole goes. The rest would be merely nonsense without that first section." (*Congressional Globe*, second session Forty-first Congress, 1869–70, page 4887.)

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For Defendants in Error.

Ruling of Boutwell, Int 16, 63 —
Boutwell's Manual 1869, p 219

13, St p 281 —

6 Wallace p 15 —

4, P F Smith p 357,

12 — Opinions Atty General — 278-9,
1402

Current Internal 303
Revenue Laws, 301
— 1870 —

15th Judge Gray

Supreme Court of the United States.

THE PHILADELPHIA AND READING RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

Brief on behalf of other Railroad Companies interested with Plaintiff in Error, in the question involved, filed by leave of Court.

BY

J. W. SIMONTON,

Counsel for Said Companies.

Supreme Court of the United States.

THE PHILADELPHIA AND READING RAILROAD COMPANY,

Plaintiff in Error,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

Error to the Supreme Court of the State of Pennsylvania.

BRIEF OF ARGUMENT FOR PLAINTIFF IN ERROR.

Before entering upon the discussion of the important question raised by the record in this case, it may not be out of place to premise, that it is not a question either of the power or of the right of the State of Pennsylvania to tax her railroad corporations, and by taxation to exact from them such proportion of her revenues as she may deem expedient. Unquestionably she has both the right and the power to do this; neither can be denied to her, nor is there any to whom she is responsible for their exercise, so long as she exercises them in any one or more of the many modes, and upon any one or more of the various subjects which are within her political sovereignty. All the property and franchises of these corporations, situated within her borders, are legitimate subjects of her tax laws, and legitimate sources from which she may derive revenue; and we merely repeat a truism when we admit that the power of taxation, wherever it exists at all, is so unlimited, that the amount which may be exacted is to be determined only by the sovereign discretion of the taxing power. There is, therefore, absolutely no ground for the suggestions which have been made, that an adverse decision in this case would injuriously affect the revenues of the State of Pennsylvania. If the subjects she has chosen, or the mode she has adopted in this instance, are denied to her by the fundamental law of the nation, she can still exact from legitimate subjects, and in legitimate modes, revenues limited as to amount only by her uncontrollable discretion.

And that she has already, in anticipation, not waiting for a decision on the law in question here, enacted substitutes for it, and imposed a multitude of taxes on these corporations, will be seen by a reference to the appendix to this brief, where will be found a copy of her consolidated corporation tax law, with the date when each of the acts was passed.

We have direct authority for the position that the mode of taxation adopted becomes a question, not of form but of substance, when it determines the subjects to be affected by the burden imposed. Thus the cases of *Bank of Commerce* vs. *New York City*, 2 Black 620, *Bank Tax Case*, 2 Wallace 200, *Society for Savings* vs. *Coite*, 6 Wallace 594, and *Provident Bank* vs. *Massachusetts*, 6 Wallace 611, all turned upon the point, whether the necessary effect of the mode of taxation adopted, respectively, by the tax laws under consideration, would be to impose the ultimate burden upon the franchises of the banks, or upon their property, invested in part in securities of the United States. In either case the tax was to be paid by the bank to the State; yet not who was to pay the tax, but what was the subject of it, determined its true character and its constitutionality. In all these cases the only point at issue was whether the tax claimed was one on the property or on the franchises of the banks; in the two earlier cases, this court held it to be a tax on the property, and as that was invested in United States securities, held it unconstitutional; in the two latter, the court—three members dissenting—held it a tax on the franchises, and hence, although the property of the banks was invested in United States securities, held it to be constitutional.

In thus deciding in these four cases, the court did not hold that the Massachusetts institutions were taxable, and that those of New York were not; it did not concede to one State a power to tax which it denied to the other; it did not take away a source of revenue from one State which it left to the other; nor did it at all interfere with the right or the power of either of these States to tax, and by taxing, to raise any amount of revenue she might see fit from these and all other like institutions within her territory. New York had just as much right and power to increase her revenues from her banks, after the decision against her law, as Massachusetts had after that in her favor. The mode adopted by Massachusetts, and held valid, was just as effectual in producing revenue, as would have been that adopted by New York, and held void.

And so it will be in this case. Should this court hold the tax law in question here unconstitutional and invalid, because, on account of the mode adopted, the tax, although to be paid over to the State by the railroad company, must necessarily fall, in the ordinary course of trade, upon the articles of commerce transported over the road, which are protected by the constitution of the United States from such taxation, the right or power of the State of Pennsylvania to tax these companies will not thereby be in the least impared, nor her ability to obtain all needed revenue affected. There are modes sanctioned by the constitution in which she may tax them to any extent she may deem just, or even expedient.

A still stronger illustration of the fact that the mode in which taxes are levied may be a question of substance, and not merely of form, is given in the *State Tonnage Tax Cases*, 12 Wallace 204, where the tax in question upon certain vessels was held to be "a duty on tonnage," and therefore prohibited by the constitution, while at the same time it was conceded that a tax might be lawfully levied upon the same vessels, as property belonging to citizens of the State. In either case the tax would fall upon the same subject, and be payable by the same persons. Its validity, however, was determined by the mode in which it was levied.

We contend, therefore, that no argument can be drawn from the supposed necessity of the case, assuming such an argument to be legitimate, as no such necessity exists; and if it did, this court would not sanction a law repugnant to the constitution of the United States on the plea of necessity.

Passing, then, to the main question in the case, we contend:

FIRST, *That the tax imposed by the act of August 25, 1864, is not a tax upon the franchise or business of the carrier measured by the* *umber of tons of freight carried, but that it is a tax upon the freight ransported, imposed because it is transported.*

The act is entitled "*An act to provide additional revenue for the se of the Commonwealth,*" and the section imposing the tax levied gainst the plaintiffs is as follows:

" The president, treasurer, cashier, or other financial officer of very railroad company, steamboat company, canal company and lackwater navigation company, and all other companies now or ereafter doing business within this State, and upon whose works reight may be transported, whether by such company or by individuals, and whether such company shall receive compensation or transportation, for transportation and toll, or shall receive olls only, except turnpike companies, plank road companies and ridge companies, shall, within thirty days after the first days of anuary, April, July and October, of every year, make return in writing to the Auditor General, under oath or affirmation, stating ully and particularly the number of tons of freight carried over, hrough or upon the works of said company, for the three months mmediately preceding each of the above-mentioned days; and ach of the companies, except as aforesaid, shall, at the time of making such return, *pay to the State Treasurer, for the use of the Commonwealth, on each two thousand pounds of freight so carried, ax at the following rates, viz: First, on the product of mines, quarries and clay beds, in the condition in which said products may be aken therefrom, two cents; second, on hewn timber, animal food, including live stock, also, on the products of the forest, vegetable and ther agricultural products, the value of which has not been increased by labor, three cents; third, on all other articles, five cents.*

Where the same freight shall be carried over and upon different but continuous lines, said freight shall be chargeable with tax as if it had been carried but upon one line, and the whole tax shall be paid by such one of said companies as the State Treasurer may select and notify thereof; such companies whose lines of improvements are used by others for the transportation of freight, and whose only earnings arise from tolls charged for such use, are authorized to add the tax hereby imposed to said toll, and collect the same therewith, but in no case shall tax be twice charged on the same freight carried on or over the same line of improvements: ***Provided,*** That every company now or hereafter incorporated by this Commonwealth, whose line extends into an other State, and every corporation, company, or individual of an other State, holding and enjoying any franchises, property o privileges whatever in this State, by virtue of the laws thereof shall make returns of freight, and pay for the freight carried over through and upon that portion of their lines within this State, a if the whole of their respective lines were in this State."—Se *Pamphlet Laws* 1864, *p.* 988; *Brightly's Purdon's Digest, p.* 1379 *pl.* 11.

That the tax imposed by this act is, in substance and effect, a tax on the articles of commerce transported, payable because they are transported, will, we think, clearly appear from an examination of its leading provisions.

In the first place the tax is, in express terms, imposed upon the *freight carried.* The act provides that there shall be paid to the State Treasurer, for the use of the Commonwealth, *on each two thousand pounds of freight so carried, tax, at the following rates, viz*

First. On the product of mines, quarries and clay-beds, in the condition in which said products may be taken therefrom, two cents.

Second. On hewn timber, animal food, including live stock, also on the products of the forest, vegetable and other agricultural products, the value of which has not been increased by labor, three cents.

Third. On all other articles, five cents.

It will be observed that the only condition which determines the attaching of the tax is, that there be *freight*, and that it be *carried*, whether one or one hundred, or three hundred miles, is immaterial; whenever *freight* is *carried*, it is *taxed*, the amount being determined by its character. This provision of the act points clearly to the *transportation of freight*, or articles of commerce, as the subject of the tax.

What follows, makes this still more plain:—"*Where the same freight shall be carried over and upon different but continuous lines, said freight shall be chargeable with tax, as if it had been carried but upon one line, and the whole tax shall be paid by such one of said companies as the State Treasurer may select and notify thereof.*"

If the tax be upon the railroad company, measured by the number of tons transported, why exact it from one and not from another? And why leave it to the discretion, or caprice, or favoritism, of the State Treasurer, to determine which company shall be taxed, and which shall escape taxation? If meant to be imposed upon the company, can that be called *taxation* which is so devoid of *rule* in its imposition? Would it not be rather a forced contribution, such as no Legislature can be presumed to have intended to authorize, or as would be legal if they had?

In the case of *Clarke* vs. *The Philadelphia, Wilmington and Baltimore Railroad Company* in the Court of Errors and Appeals of Delaware—Legal Intelligencer, Philadelphia, 1871, p. 260. Bates, Chancellor, speaking of an analagous provision in the act there under consideration, says:—"Still another clause in the act leading to the same conclusion"—that it was "in substance and effect, a tax upon the passenger,"—"is that proviso of the first section, which imposes only one tax in respect of a passenger traveling over several connected railroads, and charges the payment of that one tax upon the company *which first receives the passenger*. If the tax be considered as laid upon the passenger, to be paid for the privilege of making one journey by the public modes of travel within the State, this is a provision both just and convenient; but it is not reconcilable with the theory, that this is a tax levied upon the railroad company, for the privilege of exercising a public employment, in which aspect it should equally attach to each company exercising such privilege, whether the passenger conveyed by it was received from another company or not."

If this was the conclusion to which the judicial mind was necessarily brought in that case, where, at least, a rule was prescribed to determine which company should be liable to the tax in any given case, much more must it be so here, where the law, as we have seen, leaves it to the arbitrary discretion of a single official to determine this.

But there is another provision in this act which must lead to the conclusion that the Legislature intended the tax to fall upon the freight transported. It is as follows:

"*Corporations whose lines of improvement are used by others for transportation of freight, and whose only earnings arise from tolls* *charged for such use, are authorized to add the tax hereby imposed, to said tolls, and to collect the same therewith.*"

As all such companies would undoubtedly, if compelled to pay the tax, avail themselves of the permission here given, and add the tax to the toll, it would thus inevitably fall upon the commodities and articles of commerce carried, and as this is the certain result of the enactment, it must be presumed that it was so intended.

It may, perhaps, be argued, as no authority is in express terms given in the act to those companies which carry freight for hire, to add the amount of the tax to their existing charges, that the tax would at least fall upon them ; but in answer to this, we would point out the fact that there is hardly one of these companies which has not the right, either under its special charter, or the nineteenth section of the general railroad law of Pennsylvania, (P. L. 1849, p. 86; Purd. Dig. p. 840, pl. 20,) and the decisions of the Supreme court of the State, in *Boyle* vs. *The Railroad*, 54 Pa. St. R., (4 P. F. Smith,) 310, and *Cumberland Valley Railroad Company's Appeal*, 62 Pa. St. R., (12 P. F. Smith,) 218, without any additional legislation, to add the amount of this tax to their charges for freight. Such a provision as the one suggested would therefore have been unnecessary.

To quote again from Chancellor Bates: "The position of the carrier under this law is substantially that of one to whom public taxes are farmed out ; who undertakes by contract to advance to the government a required revenue, with power by suit or distress to collect the like amount out of those on whom the tax is laid. The only imaginable difference is, that in the case of taxes farmed out, the obligation to account to the government is voluntarily assumed by contract, and not imposed by law, as under this act; also that different means are provided for raising the tax out of those ultimately chargeable with it ; but the mode of collection under this act is none the less effectual, but far more so, than by suit or distress ; for the tax is exacted from the passenger before he is allowed to enter a car or steamboat ;" and we may add from the owner of the freight, before it is transported, or at least before it is delivered to him or the consignee, or discharged from the carrier's lien at the place of delivery.

Gilpin, C. J., in a concurring opinion in the same case, says: "Now I beg to remark, that on considering the act with the view of determining its true construction, we must look beyond its phraseology, to the substance and real meaning underlying the mere letter of the act." * *

"When I find, as I do on reading the proviso, that where, on the same occasion, the passenger travels over several connecting roads, belonging to different companies, *only one tax* of ten cents is required to be paid for traveling over all the connecting roads, and that this tax is to be paid by the company upon whose road the journey began, thus entirely exempting from taxation all the other connecting roads in the State, over which the passenger may travel in the course of his journey;" * * * "and when, in addition to this, I consider that by the fourth section of the act, the company is expressly authorized to increase its charge for transportation 'to the amount of the tax' beyond what the passenger would have been required to pay, thus making the passenger actually pay the tax before commencing his journey, I am forced to the conclusion that it cannot properly be held to be a tax on the business of the company."

We think it is manifest from this examination of the act, that it is in substance and effect a tax upon the articles of commerce carried over the road, and therefore we contend:

SECOND, *That so far as this tax law affects articles transported from one State into or through another, it amounts to a regulation of commerce, and is therefore repugnant to the constitution of the United States, and void.*

That the transportation for purchase and sale, of the articles of freight enumerated and taxed in this act, is a commercial transaction, cannot be questioned; and when they are transported from one State to another, it is commerce among the several States. This is clear from the definition which has been given of commerce by judges of this court.

In the case of *Corfield* vs. *Coryell*, 4 Wash. C. C. R. 398, Judge Washington says: "Commerce with foreign nations and among the several States can mean nothing more than intercourse with those nations and among those States for the purposes of trade, be the object of the trade what it may; and this intercourse must include all the means by which it can be carried on, whether by the free navigation of the waters of the several States or *by a passage over land through the States*, when such passage becomes necessary to the commercial intercourse between the States. It is this intercourse which Congress is invested with the power of regulating, and with which no State has a right to interfere."

And in deciding *Gray* vs. *The Clinton Bridge*, in the Circuit Court, which was afterwards affirmed in this court, Mr. Justice Miller says: "Navigation, however, is only one of the elements of commerce. It is an element of commerce because it affords the means of transporting passengers and merchandise, the interchange of which is commerce itself. Any other mode of effecting this would be as much an element of commerce as navigation. When this transportation or interchange of commodities is carried on by land, it is commerce as much as when carried on by water; and the power of Congress to regulate it, is as ample in the one case as in the other. The "commerce among the States," spoken of in the constitution, must at the time that instrument was adopted, have been mainly of this character, for the steamboat, which has created our great internal commerce on the rivers, was then unknown." 7 Am. L. Reg. (N. S.) 149.

In the *Passenger Cases*, 7 Howard, 416 Wayne, J., quoting Marten's Summary of the Law of Nations, says: "Commerce consists in selling the superfluity, in purchasing articles of necessity, as well productions as manufactures, in buying from one nation and selling to another, or in *transporting the merchandise from the seller to the buyer to gain the freight*."

In *Groves* vs. *Slaughter*, 15 Peters 511, Baldwin, J., says: "Commerce among the States, as defined by this court, is trade, traffic, intercourse, and dealing in articles of commerce between States by its citizens or others, and carried on in more than one State."

It thus clearly appears that the term "commerce," as used in the constitution of the United States, includes the transportation of commodities and articles of traffic from one State to another, in the manner in which the articles claimed to be taxed in this case were transported.

Does this act then, which taxes the transportation of freight from State to State, and requires the owner of such freight, so transported, to pay the tax, amount to a regulation of commerce, such as is forbidden to the States by the clause in the Constitution of the United States, which provides that "Congress shall have power to regulate commerce with foreign nations, among the several States, and with the Indian tribes?"

That it is a "regulation" of commerce cannot, we think, be questioned, for when we remember the well settled principle that, where the taxing power exists at all, there is no limit to its exercise but the will of the Legislature, and that as expressed by Marshall, C. J., in *M'Cullough* vs. *State of Maryland*, 4 Wheaton 430, "it is a question of *power*, and if the power to tax exists, it may be so exercised as to destroy;" we cannot fail to see that any duty, impost, tax or burden upon commodities, or articles of traffic carried from one State to another, or upon the transportation or means of transportation, by which they are carried, capable from its nature of increase in kind, to such an extent as to seriously obstruct and impede free commerce between the States, must be a regulation of commerce.

But is it such a regulation of commerce as the States are forbidden to make? We contend that it is, and that it must be so held, whether we regard the power to regulate commerce as vested exclusively in Congress by the constitution or not, a point upon which the members of this court have differed so much, that we shall not discuss it here.

For the purpose of this argument, we shall assume it to be settled, that there are certain subjects upon which the States have a right to legislate, either absolutely or subject to Congressional control, and that it is no valid objection to such legislation, that it does in some degree affect, incidentally at least, commerce with foreign nations, or among the several States. Belonging to this class are, in the words of Marshall, C. J., in *Gibbons* vs. *Ogden*; "inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries;" and as is said in *Gilman* vs. *Philadelphia*, "bridges are of the same nature with ferries, and are undoubtedly within the category thus laid down." To this may be added all the various laws that spring from a valid exercise of the police power of the State; and by express decision of this Court, pilot laws.

All the subjects embraced within this class of legislation are, in their very nature, essentially local, and hence can be best regulated by laws local in their operation. Thus it would be practically impossible for Congress to enact any general law which would suitably regulate all bridges and ferries throughout the Union, or to establish one uniform system of pilot, quarantine and health laws, which would be fitted alike for every port in the United States. These things, from the nature of the case, can be properly regulated only by local laws, and hence must be supposed to have been left to the jurisdiction of local Legislatures, even should these laws incidentally, in their practical working, affect the operations of commerce; subject, however, to the controlling power of Congress, and this court, when they pass beyond the bounds prescribed for them. This, as we understand, is the ground and reason of the doctrine laid down by the court in *Cooley* vs. *Board of Wardens*, 12 Howard 299, and re-affirmed in *Gilman* vs. *Philadelpxia*, 3 Wallace 713, and of which the court say in *Crandall* vs. *Nevada*, 6 Wallace 35, "perhaps no more satisfactory solution has ever been given of this vexed question, than the one furnished by the court in that case. After showing that there are some powers granted to Congress which are exclusive of similar powers in the States, because they are declared to be so, and that other powers are necessarily so, from their very nature, the court proceeds to say, that the authority to regulate commerce with foreign nations, and among the States, includes within its compass powers which can only be exercised by Congress, as well as powers which, from their nature, can best be exercised by the State Legislatures; to which latter class the regulation of pilots belongs. Whatever subjects of this power are, in their nature, national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

Among the subjects thus classified as local, some, including pilot, inspection, quarantine, health and police laws generally, are in their very natures so peculiarly so, that in any given case it is only necessary to satisfy the court that the State law in question is *bona fide* one belonging to either of these classes, to induce them to uphold it. To this category belong most of the cases cited by the counsel for defendant in error, in which State legislation incidentally affecting commerce has been upheld by this court.

A leading case of this class is *City of New York* vs. *Miln*, 11 Peters 104, which was an action brought by the city, to recover from the master of a foreign vessel, who had failed to report to the mayor, the age, &c., of every passenger brought into the port by him, as required by a law of New York, the penalty prescribed by the act for such failure. The act was considered to be a police regulation, and on this ground alone was held to be constitutional.

Groves vs. *Slaughter*, 15 Peters 449, was a case involving the question of the constitutionality of an act of the Legislature of the State of Mississippi, declaring that after a certain date no slaves should be imported into that State, and the act was upheld on the ground that it was a police regulation.

To the same class belong the well known *License Cases*, 5 Howard 504, which were held, so far as they would otherwise have been obnoxious to the charge of being repugnant to the constitution of the United States, to be a valid exercise of the police power of the States. Mr. Justice Grier, in his opinion in these cases, p. 632, says: "It has frequently been decided by this court, 'that the powers which relate to merely municipal regulations, or what may more properly be called internal police, are not surrendered by the States, or restrained by the constitution of the United States; and that consequently, in relation to these, the authority of a State is complete, unqualified and conclusive.' Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed, that every law for the restraint or punishment of crimes for the preservation of the public peace, health and morals, must come within this category. As subjects of legislation they are from their very nature of primary importance; they lie at the foundation of social existence; they are for the protection of life and liberty, and necessarily compel all laws on subjects of secondary importance, which relate only to property, convenience or luxury, to give way when they come into conflict or collision; *salus populi suprema lex.*" And to the same effect is what Mr. Justice M'Lean says, pp. 589, 590, in same cases. It is manifest, therefore, that neither those cases nor any others belonging to the same category, can be used as precedents in favor of any law which does not belong to the same class; and it is equally clear that the law in question in this case cannot possibly be thus classified.

Cooley vs. *Board of Wardens*, 12 Howard 299, was decided on the principle stated in the following extract from the opinion of the court, p. 319: "The act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject—'the regulation of pilots and pilotage'—is such that until Congress should find it necessary to exert its power, it should be left to the legislation of the States; that it is local and not national; that it is likely to be best provided for, not by one system or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits." * * * "It is the opinion of a majority of the court, that the mere grant to Congress of the power to regulate commerce, did not deprive the States of power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several States. To these precise questions, which are all we are called on to decide, this opinion must be understood to be confined."

This case, therefore, is not an authority on any other subject but it is valuable for general purposes because of the distinction taken between the nature of the different subjects of the power to regulate commerce, which has been recognized and adopted in later cases. Mr. Justice Curtis, delivering the opinion of the court, says: "The diversities of opinion, therefore, which have existed on this subject"—the power to regulate commerce—"have arisen from different views taken of the nature of this power. But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say that they are of such a nature as to require exclusive legislation by Congress. Now, the power to regulate commerce embraces a vast field, containing not only many but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States, in every port; and some, like the subject now in question, as imperatively demanding that diversity which alone can meet the local necessities of navigation."

"Either absolutely to affirm, or deny, that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

This case was cited with approval on this point in *Gilman* vs. *Philadelphia*, 3 Wallace 713, and the decision of that case was put on the ground that on the facts involved in it, it was of such a local nature as brought it within the view above quoted; and in that case the court also refer to *Wilson* vs. *The Blackbird Creek Marsh Co.*, 2 Peters 250, as an important authority for the principle that subjects local in their very nature may be legislated upon by the States. We do not think it can be questioned that this is the full extent to which this latter case goes, even if it is not rather, as the dissenting Justices in *Gilman* vs. *Philadelphia* thought, an example, merely, of the exercise of the police power of the State; a view which was advanced and enforced by argument by Mr. Justice M'Lean, in his opinion in the *Passenger Cases*, where he says: "The act of the State was an internal and a police power to guard the health of its citizens. By the erection of the dam commerce could only be affected as charged, consequentially and contingently. The State neither assumed nor exercised a commercial power. In this whole case nothing more is found than a forbearance to exercise power over a doubtful object, which should ever characterize the judicial branch of a government." 7 Howard, pp. 397–8.

We contend, therefore, that none of these cases belongs to the same class as the one now before the court. To them all may be rightly applied the language used by Mr. Justice Strong, in *Minot* vs. *Railroad Company*, Circuit Court, Delaware, reported in the Legal Intelligencer, Philadelphia, 1870, p. 369: "I apprehend it will be found on examination that the cases that have sustained State laws alleged to have been regulations of inter-state commerce, have been those that related to bridges or dams across streams wholly within a State, or other kindred subjects—things only in a restricted sense commercial subjects —*Wilson* vs. *Blackbird Creek Marsh Co.*, 2 Peters 250; *Gilman* vs. *Philadelphia*, 3 Wallace 713. They are exceptional. The subjects are such as in the last mentioned case it is said can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operations to such localities respectively."

Here then we have the test by which to determine the class to which any given law belongs. Inspection, quarantine and health and police laws generally, are within the legislative power of the States, on the principle that *salus populi suprema lex*, and certain other laws of an exceptional nature are so, because the subjects are such as "can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operations to such localities respectively."

So far as we have been able to discover them, all the cases of State laws alleged to have been regulations of inter-state commerce, which have been sustained by this court, do belong to the above classes, and have been sustained on the above grounds. And as is said by Mr. Justice Strong, in the case above quoted: "It may safely be said that none of them are like the present. They admit, and some of them assert, that whatever subjects of the power to regulate commerce are, in their nature national, or *admit of one uniform plan or system of regulation*, may justly be said to be of such a nature as to require exclusive legislation by Congress. Surely passage and transportation through a State are of this nature. If not, it is unfortunate. It is of national importance that, in regard to such subjects, there should be but one regulating power, for if one State can directly tax persons and property passing through it, or indirectly by taxing the means of transportation, every other may, and thus commercial intercourse between States remote from each other may be destroyed. The produce of western States may be effectually excluded from eastern markets, for though it might bear the imposition of a tax by one State, it would be crushed under the weight of many."

The ground upon which it must be held that a regulation of commerce, such as is involved in this case, is in its nature, national is here clearly indicated. The question must necessarily be looked at in this court from a national point of view. A decision that this law is constitutional cannot be made without deciding that every State in the Union may pass a law of the same kind, and that the existence of all of them at once, would not amount to a regulation of inter-state commerce. And surely this cannot be successfully maintained. All the commerce of all the States would be affected, and that not in a uniform manner, but in as many various ways, and with as many different burdens as the varying habits, caprices or necessities of the various States might suggest. The learned counsel for the defendant in error in this case say: "Does the tax now under discussion, 'institute a regulation of commerce of a national character,' or one which 'has a uniform operation over the whole country?' It seems almost idle to discuss such a question. Surely the dealing between the Reading railroad company and the Commonwealth of Pennsylvania as to the taxes on its business of shipping coal from the mines to Port Richmond, in Philadelphia, is not a national regulation."

This is to forget or ignore, what is undoubtedly true, that this court cannot uphold the law in question in this case without in substance and effect declaring to every Legislature of every State in the Union, that they have authority to pass a similar law, with such variations not affecting its essential principle, as they may choose to introduce; and that one of these allowable variations would be to make the tax two dollars "on each two thousand pounds of freight," instead of two cents; and thus all the commerce of the whole Union—the commerce of the Nation—would be subject to endless regulations and exactions, which would not indeed be "uniform," but would certainly be "national" in their character. And the very fact that these regulations and exactions would not be uniform is one of the grounds upon which they must be held unconstitutional, for even the power of Congress on this subject is limited by the provision of the constitution, that all duties, imposts and excises shall be uniform, the spirit of which provision, if not the letter, would be violated by such a series of laws as would be made possible, and if possible, probable, by a decision in favor of this law.

And even if the burden and the mode of exacting it were the same in each State, it would not fall equally on the commerce of the country, but a tax being exacted for transportation in each State, the number of taxes paid upon any given article of commerce would be measured by the number of States into or through which it might pass. If this would not be regulating commerce among the States, it is hard to conceive what would be; the crossing of State lines would be the fact upon which the number of payments of tax would be conditioned.

These considerations we think clearly show, that the law in question here can receive no support from the cases heretofore referred to, which are so much relied on by the counsel for the State. They do not, as we conceive, touch the point of this case.

We contend that there is a class of cases which directly rule this; some of which have been decided by this court, and others by the highest courts of the States, in obedience to the authoritative decisions of this court.

And here we may remark, that decisions of the State courts against the constitutionality of a State law, are entitled to much more weight than those in favor of such a law, since, beside the natural leaning in favor of the act of a co-ordinate branch of the State government, as was said in a Pennsylvania case, and as is virtually said in the opinion of the Pennsylvania Supreme Court in this case, "to doubt is to be resolved" in favor of the constitutionality of the law.

One of the cases to which we refer, decided by this court, is *Almy* vs. *The State of California*, 24 Howard 169; and another is *Crandall* vs. *The State of Nevada*, 6 Wallace 35. These cases were held by Mr. Justice Strong, in the Circuit Court for the State of Delaware, to rule one branch of the case of *Minot* vs. *The Philadelphia, Wilmington and Baltimore Railroad Company*, then before him. The question was as to the constitutionality of an act which provided that "every railroad company incorporated by the State, and doing business therein, should, on the first of January in each year, pay to the State Treasurer, a tax of one hundred dollars for the use in the said State of Delaware, of each locomotive belonging, in whole or in part, to such company, and at any time during the preceding year used by said company within the State of Delaware; and twenty-five dollars in like manner for the use of each passenger car, and ten dollars for each freight car." Most of these locomotives and cars were used for the purpose of transporting persons and property from Pennsylvania, into and through Delaware into Maryland. The learned Justice held, on the authority of these cases, that this act indirectly levied a tax both on persons and property for transit through the State, into it, and out of it, and that it was therefore unconstitutional. They apply as authorities with the same force to this case, and we cannot better state their character and bearing than by quoting the language of the learned Justice: "In *Almy* vs. *The State of Calafornia*, 24 H. 169, it was ruled by the Supreme Court, that a law of the State imposing a stamp duty upon bills of lading for gold or silver transported from that State to any place or port out of the State, was substantially a tax upon the transportation itself, and was unconstitutional. It is true, the decision was rested on the ground that it was a tax upon exports; and subsequently, in *Woodruff* vs. *Parham*, 8 Wallace 123, the court denied the correctness of the reason given for the decision, but they said at the same time that the case was well decided for another reason, viz: that such a tax was a regulation of commerce—a tax imposed upon the transportation of goods from one State to another, over the high seas, in conflict with that freedom of transit of goods and persons, between one State and another, which is within the rule laid down in *Crandall* vs. *Nevada*, 6 Wallace 35, and with the authority of Congress to regulate commerce among the States. In the very recent case of *Crandall* vs. *The State of Nevada*, 6 Wallace 35, it was held that a special tax imposed by the State on railroad and stage companies, for every passenger carried out of the State by them, was a tax on the passenger for the privilege of passing through the State by ordinary modes of travel, and not simply a tax on the business of the companies. Hence, it was ruled that the power of a State to impose such a tax, is inconsistent with rights conferred by the constitution on the Federal government and on the people, and consequently that no State can lay such a tax. The majority of the court, indeed, declined to put their decision upon the ground that the tax was a regulation of inter-State commerce, and as such, beyond the reach of the State, but all the judges agreed that the State law was unconstitutional and void. The Chief Justice and Mr. Justice Clifford thought the judgment should have been placed exclusively on the ground that the act of the State Legislature was inconsistent with the power conferred upon Congress to regulate commerce among the several States, and I do not understand that the other members of the court held decisively that it was not thus inconsistent. The case in any view of it, decided that a State cannot directly or indirectly tax persons for passing through or out of it."

If the States cannot thus tax persons, they certainly cannot tax property; if persons have the right guaranteed to them by the Constitution of the United States to pass freely from and through the States, this right must extend to the same freedom of transporting their property; and this court have so said in *Woodruff* vs. *Parham*, recognizing, as above quoted, that the principle of *Crandall* vs. *Nevada*, applies to property as well as persons. Hence these cases are, as we understand them, direct authority on the question now before the court.

The case of *The Erie Railway Company* vs. *The State of New Jersey*, 2 Vroom 531—which, by the way, overrules *New Jersey* vs. *Delaware and Lackawanna Railroad Company*, 1 Vroom 473, cited, page 60, of defendant's brief—is another well considered case, and, as we think, directly in point here. It was there decided by the Court of Errors and Appeals, reversing the judgment of the Supreme Court, that a law laying a tax on the railway corporation engaged in transporting goods and passengers from State to State, the tax being graduated by the weight of the goods and the number of passengers carried, was repugnant to the clause of the Constitution of the United States giving to Congress the power to regulate commerce among the several States. The reasoning of this case will be found, on examination, to be cogent and well sustained.

Another case, of which the same may be said, is *Clarke* vs. *The Philadelphia, Wilmington and Baltimore Railroad Company*, in the Court of Errors and Appeals of Delaware, already cited. The act in that case, in language, and with provisions so much like those of the law now in question, as to bear internal evidence of—which we understand to be the fact—having been copied and adapted from it, imposed upon the company a tax of ten cents for each passenger carried into, through or out of the State, and the court, Bates, Chancellor, and Gilpin, Chief Justice, delivering concurring opinions, pronounced it a tax on the passenger, and as such a regulation of commerce, and hence unconstitutional.

Another case directly in point is the case of the *Carson River Lumbering Company* vs. *Robert Patterson*, 33 California, 334. The Legislature of that State, in 1866, passed an act authorizing the supervisor of Alpine county to charge and collect a toll for floating and transporting saw logs and cord-wood on said river, which extended from the State of California into the State of Nevada, and an attempt was made under said act to collect such toll upon saw logs and cord-wood so transported from the State of California to the State of Nevada. The case came into the Supreme Court of the State, and the act, so far as related to articles transported from one State to another, was held by the court to be unconstitutional and void. The court say:

"It is not claimed, nor can there be any pretence for claiming, that the act whose constitutionality is brought in question in this action is a police regulation. It has no bearing on public health, public morals or public society. It was passed for the sole purpose of raising revenue off a portion of the traffic between California and a sister State, a commerce in which both States were and are alike interested, and the control of which is vested in the general government alone, the common superior of both."

"But the attempt to regulate inter-State commerce in this case is by an impost on coal and lumber, considered as exports from California, and the power to regulate commerce between the States in that particular way is prohibited to the States by an express provision of the Constitution. The toll imposed by the terms of the act for the use of the river, though different in form from a duty or tax on the wood or lumber transported, is, in substance, the same thing. *Almy* vs. *California*, 24 How., 174; *Brunnagen* vs. *Tillinghast*, 18 Cal., 266."

Another case is *People* vs. *Raymond*, 34 Cal., 492. In this case it appeared that, by an act of the Legislature of California, passed in 1862, it was made a penal offence for any person authorized to sell passenger tickets, or to make contracts for the passage, on vessels or steamers about to leave the port of San Francisco for any port without the limits of the State, to issue any such ticket, or make any such contract for passage, without having first procured and placed certain stamps, to be issued by the State, on such ticket, or on the memorandum of the contract, or if the contract was verbal, without having first paid to the stamp inspector the price of the stamps. The court held that as a State cannot accomplish by indirect methods what it is forbidden to do directly, this tax was a regulation of commerce in the sense of the Constitution, and therefore the act imposing it was unconstitutional and void.

We think we may say, without fear of successful contradiction, that no tax law, similar to the one in question, which has succeeded in passing the barrier of the highest State court—which, indeed, few of them have done—has been endorsed by this court; and that the decisions and principles here laid down, must forbid this to be done.

But it is argued that our case differs from the cases above cited, in that here the tax falls upon the internal commerce of the State as well as upon inter-State commerce, while in those cases it did not. We admit that in most, though not in all of them, the tax fell only upon persons or property passing through, into or out of the State. But we contend that this was not made the ground of the decision in any of the cases, and in the nature of the case it could not be. If the State of Nevada had not the right under the Constitution of the United States, to impose a tax upon passengers traveling out of that State to other parts of the Union, surely she could not obtain it by at the same time imposing a like tax upon those traveling from one point to another within the State.

The law of the State of Delaware, upon which the case of *Minot* vs. *The Railroad Company*, already quoted, arose, made no discrimination in this respect, and in answer to the argument, based on this fact, Mr. Justice Strong said: "It is not the less a commercial regulation, because it does not discriminate between transportation exclusively domestic, and that which extends into other States. If a State chooses to exact conditions for allowing the passage or carriage of persons or freight through it into another State, the nature of the exaction cannot be changed by adding to it similar conditions for allowing transportation wholly within the State. I need hardly add that a tax upon the ordinary and lawful means of transportation is practically a tax upon the thing transported."

So in the case of *Clarke* vs. *The Railroad Company*, in the Court of Errors and Appeals of the same State, cited above, there was no discrimination, and Chancellor Bates said: "It may as well be observed at this point, that no argument in support of the act can be drawn from the fact that it operates as well upon our own citizens traveling wholly within the State, as upon the citizens of other States passing into or through its territory."

"If the Legislature have not the constitutional power to tax a particular class of passengers, plainly that power cannot be derived by including under the tax laws another class of passengers who may, constitutionally, be taxed. Legislative acts to the validity of which the question of discrimination becomes material, are those which deal with a subject matter fully within the constitutional power of a State, but deal with it in a mode affecting unequally its own citizens and the citizens of other States, contrary to that clause of the Federal Constitution which secures to the citizens of each State, 'all the privileges and immunities of citizens the several States;' (Art. 4, Sec. 2); as if citizens of other States should be placed upon an unequal footing with our own citizens, under laws for the administration of public justice, or touching the descent of real estate, or the distribution of the personal estate of intestates; or as if in the taxing of lands situated within the State, non-resident real estate owners were taxed more heavily than our own citizens holding lands. But in the present case, the Supreme Court"—of the United States—"having decided that inter-State travel is beyond the taxing power of the State, the only question is whether this act undertakes to tax the forbidden subject matter, and it is quite immaterial whether the act also operates upon travel within the State, a subject matter under State control."

But this point has been so ably argued by the learned counsel directly concerned in this case, that we will not pursue it further, except to remark, that not one of the cases decided adversely to the right of the States to tax inter-State commerce, has been put upon the fact of discrimination; as an examination of the cases, notwithstanding what is said in the argument of counsel, and the opinion of the Supreme Court of the State, will clearly show.

And, indeed, under the principle as to the relative powers of Congress and the State Legislatures, laid down in *Cooley* vs. *Board of Wardens*, and since recognized and established in *Gilman* vs. *Philadelphia* and *Crandall* vs. *Nevada*, if legislation affecting inter-State commerce operates upon that class of subjects "which are in their nature national, or admit of one uniform system or plan of regulation," it is exclusively within the power of Congress, and therefore State legislation affecting it *must* be unconstitutional, no matter what other lawful subjects are embraced within the operation of the same law.

Now we think we have already shown that, in the very nature of the case, this is so; and we also think we can further show that this law, from its very nature, does discriminate against inter-State commerce, as compared with that wholly within a State. That is to say, such would necessarily be the case in the very nature of things if the law existed in two or more contiguous States; and if it may constitutionally exist in one it may exist in all. The effect of a decision in favor of its validity would be to make it possible in all, and hence, as we have already seen, we can only judge of its effect, and of the effect of such a decision, by viewing it as though already existing in all. The counsel for the State, as we understand them, and the Supreme Court of the State certainly, admit that the existence of such discrimination, as a legitimate consequence of the working of the law, would be fatal to its constitutionality. The court says:

"Then, on what principle is it she cannot levy a tax on these instrumentalities for the privileges granted, because the products carried are destined for points without, or from without to points within the State? It is carriage, not destination, which gives the right of toll, tax or charge. It is not levied on them because the products go out or come in, but because they have the privilege and the benefit of transportation. They are not arrested and forbidden to enter or leave the State till a charge is paid; that would be a duty on imports or exports, and a regulation of inter-State commerce. *They are not discriminated against and required to pay more than others pay, because they go out or come into the State; that would be a regulation and a tax of inter-State commerce;* but they pay as all other products carried within the State pay, a charge for transportation—no more, no less, but the same exact freight paid by all others. The tax in this case is merely a charge upon the corporation for the freight carried over the road, levied equally on all, and rated equitably according to the character of the freight and the expense required to move it. It is clearly nothing but a tax on the business of the road, measured by the number of tons carried over it."

And again: "And it is evident it does not matter whence or whither these tons travel, so that there is no discrimination to forbid or to burden their entrance into or exit from the State, and being a tax on the benefit and the privilege of transportation on works constructed for this end, it bears equally on all."

And again: "If she does not discriminate between that which goes out or comes in and that which remains within, it cannot be said that she in any sense attempts to regulate commerce with other States, or to impose a duty on imports or exports. In principle, where there is no discrimination, there is no difference between a tax on a transporter, whether in gross or measured by the tons he carries, and a tax on the farmer, the manufacturer, the miner, the merchant or the broker, measured by the business he does."

And the counsel adopt this language as part of their argument, and seem to regard the reasoning as conclusive.

And in support of the position thus assumed, that where there is no discrimination in express terms against inter-State commerce in a State tax law, it must be upheld by the court, the cases of *Woodruff* vs. *Parham*, 8 Wallace, 123, and *Hinson* vs. *Lott*, id. 148, are cited. We think we can show that, according to the principle laid down in these cases and the later case of *Ward* vs. *Maryland*, 12 Wallace, 418, the law in question in this case must be declared unconstitutional.

In the former case, the City of Mobile, Alabama, under a provision in its charter, levied a tax on all sales at auction within the city. It was shown that the sales made by the plaintiff, Woodruff, included large amounts of goods and merchandise, the product of States other than Alabama, which were brought into the State and sold in the unbroken packages. This court held the taxing act constitutional, on the ground that it was "a simple tax on sales of merchandise, imposed alike on all sales made in Mobile, whether the sales be made by a citizen of Alabama, or of another State, and whether the goods sold are the produce of that State or some other." But if the effect of the law had been to impose heavier burdens upon merchandise produced in, or brought from, other States, or if the principle of the decision would have necessarily sanctioned the passage of laws which would have that effect, the law would have been held unconstitutional; for the court, referring to the observations contained in the opinion in *Brown* vs. *Maryland*, that "we suppose the principles laid down in this case, to apply equally to importations from a sister State," say: "If the court then meant to say, that a tax levied on goods from a sister State, which was not levied on goods of a similar character produced within a State, would be in conflict with the clause of the constitution giving Congress the right 'to regulate commerce among the States,' as much as the tax on foreign goods, then under consideration, was in conflict with the authority 'to regulate commerce with foreign nations,' we agree to the proposition."

And in *Hinson* vs. *Lott*, which arose under a statute of Alabama, which, in effect, imposed a tax of fifty cents on each gallon of whiskey sold within the State, whether of domestic manufacture, or brought from other States and sold in the original packages, the court say:—"As the tax does not discriminate against citizens of other States, but merely charges all alike, it is not an attempt to regulate commerce, but is an exercise of the taxing power of the State."

These cases clearly show that the court would not sanction any State tax laws which, in its terms or its working, would result in the imposition of heavier burdens upon the citizens or products of other States than upon those of the State enacting the law, but would hold all such repugnant to the Constitution of the United States; nor render any decision, the effect of which would be to sanction a system of State tax legislation which would result in discrimination in favor of some as against other of the States, or impose heavier burdens upon inter-State commerce than upon commerce carried on wholly within a single State.

Tried by this test, we think the law in question in this case must fall; for we conceive that a very brief examination of its nature, and of the effect of a decision upholding it, will show that if it be sustained there is absolutely nothing to prevent a system of taxation of commerce being adopted by the several States, which must necessarily result in most oppressive, unequal and injuriously discriminating taxation.

If the State of Pennsylvania can pass and enforce a law such as this, every other State in the Union can do the same The effect, therefore, of a decision of this court sustaining this law will necessarily be, to authorize every State to enrol on its statute book a similar enactment, and the existence of it in one State will be an inducement for each other State so to do. We must therefore look at the question now before the court as we would look at it if every State *had* enacted such a law, and the court were to decide whether such a system of legislation could be sustained. Now, it is perfectly obvious that with such a system of laws in operation, taxation would be unequal and discriminating. Articles of commerce transported from one point to another, both within the same State, would pay but one tax. Those transported from one State into another would pay two taxes, one in each State. Those which passed over any part of the territory of three or more States, would pay taxes limited in number only by the number of States, and in amount only by the wants or the will of the several States. This would be a direct discrimination against commerce among the States, for from the very nature of the case only the internal domestic commerce of each State would be free from burdens imposed by any other State, and would be liable to but one tax; all inter-State commerce would be subject to the burden of taxation imposed by at least two States; and the more extended and national, the more a matter of interest and profit to the nation at large, the more national and less local, in short, such commerce would become, the greater in number and amount would be the burdens and exactions imposed upon it.

Thus the citizens of those States which are obliged to transport the articles of commerce in which they traffic from a greater distance, or through a greater number of intervening States, would find their commercial transactions encumbered with heavier burdens, and subject to different and more onerous regulations, than would those of the States which deal mainly in articles produced and procured nearer home. The western merchant would pay taxes on merchandise purchased in New York, determined in number and amount by the number of State lines across which it was necessary for him to transport it. So, too, the flour and grain of the west, on its way to market, would be subject to varying burdens, determined by the same conditions. Here would be discrimination, inherent in the very nature and principle of this law, when we consider that a decision in favor of its validity involves, as a necessary inference, a declaration that a similar law may, at the same time, exist in every State in the Union. Thus commerce would be regulated, and regulated, too, in such a way, that the burdens imposed upon it would be unequal, and in many cases ruinous.

Such legislation would impose unequal burdens in another respect. It would discriminate in favor of some commercial highways, as against others. Thus the products of Calafornia, and the other Pacific States, would pay one amount of tax if brought to New York overland, through the intervening States, another, if brought by sea. And it is easy to see that such a system of taxation, as would be declared constitutional by a decision in favor of the constitutionality of this law, would amount to a prohibition of commercial transportation over the great trans-continental railways now built and building.

So the products of the north-western States, brought east by railway, would pay a different tax from those transported between the same points by way of the great lakes; and the same would be the case as to merchandise carried west. And articles of commerce, transported between the east and west, would pay more if sent by some of the great trunk lines, than if sent by others, depending upon the greater or less number of States through which these ran respectively. Merchandise going west, or produce coming east, if sent by the Erie railway, would pay tribute to Pennsylvania; if sent by the New York Central, it would escape this exaction. And thus, certainly, the spirit, if not the letter, of those clauses of the Constitution which provide that "all duties, imposts and excises shall be uniform;" and that "no preference shall be given by any regulation of commerce or revenue, to the ports of one State over those of another, nor shall vessels bound to or from one State be compelled to clear, enter or pay duties in another," would be violated. It is true, these clauses limit the power not of the States but of Congress; but as they forbid the exercise of the power in certain ways to that body which alone possesses it, we must infer an intention not to permit it to be so exercised by any one.

In the PASSENGER CASES, 7 Howard 283, Mr. Justice M'Lean says, p. 407—"If this power to tax passengers from a foreign country belongs to a State, a tax, on the same principle, may be imposed on all persons coming into or passing through it from any other State in the Union. And New York State does, in fact, lay a tax on passengers on board of any coasting vessel which arrives at the port of New York, with an exception of passengers from New Jersey, Connecticut and Rhode Island, who are required to pay for one trip in each month. All other passengers pay the tax every trip."

"If this may be done in New York, every other State may do the same, on all the lines of our internal navigation. Passengers on a steamboat which plies on the Ohio, the Mississippi, or any other of our rivers, or on the lakes, may be required to pay a tax, imposed at the discretion of each State within which the boat shall touch. *And the same principle will sustain a right, in every State, to tax all persons who shall pass through its territory in railroad cars, canal boats, stages, or in any other manner.* This would enable a State to establish and enforce a non-intercourse with every other State."

"The ninth section of the first article of the Constitution declares: 'Nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.' But if the commercial power of the Union over foreign commerce does not exempt passengers brought into the country from State taxation, they can claim no exemption under the exercise of the same power among the States."

And Mr. Justice Grier, in the same cases, delivering his opinion, p. 461, says: "Moreover, if persons migrating to the Western States may be compelled to contribute to the revenue of Massachusetts, or New York, or Louisiana, whether for the support of paupers or penitentiaries, they may with equal justice be subjected to the same exactions in every other city or State through which they are compelled to pass; and thus the unfortunate immigrant, before he arrives at his destined home, be made a pauper by oppressive duties on his transit. Besides, if a State may exercise this right of taxation or exclusion on a foreigner, on the pretext that he may become a pauper, the same doctrine will apply to the citizens of this Union; and thus the citizens of the interior States, who have no ports on the ocean, may be made tributary to those who hold the gates of entrance and exit to commerce." And again, p. 464, "Congress has regulated commerce and intercourse with foreign nations and between the several States, by willing that it shall be free, and it is therefore not left to the discretion of each State in the Union either to refuse a right of passage to persons or property through her territory, or to exact a duty for permission to exercise it."

These doctrines, we conceive, apply as well to a case when the tax is imposed on freight as when it is imposed on passengers, and recognize the principle that discrimination can no more be upheld, when it, in the very nature of the case, arises out of the practical working of the law, or its existence is permitted by necessary inference from a decision of this court, than when it is expressed by the law itself.

It is no answer to this position to say, that while the working and practical effect of such a system of tax laws, might be such as we have described—which indeed cannot be denied—yet so long as no one State imposed a greater burden upon inter-State commerce, than upon her own internal commerce, there would be no intent to discriminate. The fact might be so, but the question to be decided by this court is not one of intent. The court will look at the practical working of the law, and the practical bearing of the decision it may pronounce upon it.

And herein lies the distinction between this tax law, and those in question in *Woodruff* vs. *Parham*, and *Hinson* vs. *Lott*. Those acts did not discriminate in terms, and from the nature of their subject matter, if there was no discrimination in terms, there would be none in their practical operation and effect. If a like law had been in operation in every other State in the Union, no article sold, no matter where produced, or whence it came, whether from within or from beyond the borders of the State where sold, would have been taxed twice. No two of these laws could operate upon the same subject matter. The tax was conditioned by the sale, and this being made, the transaction was ended. Hence, so far as the matter of discrimination and non-discrimination was concerned, these tax laws were unobjectionable. At the same time, the opinion in *Hinson* vs. *Lott*, shows that the court will carefully scrutinize the whole scope and effect of the statute under review, and will not determine from the mere language of the act, whether it does or does not discriminate.

And the court say in this case, that a discriminating tax belongs to that class of legislation which is forbidden to the States, whether Congress has legislated on the subject or not. Hence, when a case occurred where, in the tax law in question, a discrimination was made against the citizens and products of States, other than the one enacting the law, this court did not hesitate to pronounce such law unconstitutional. This was the recent case of *Ward* vs. *Maryland*, 12 Wallace, 418. In this case the law of Maryland required all traders in goods, chattels, wares and merchandise, whether permanent residents in the State or not, to obtain and pay for a license to trade, but, as was inferred from a comparison of the acts and the mode of their operation, required these not permanent residents of the State to pay a larger sum for such license than was required from residents. This court says: "Taxes, it is conceded in these cases,"—*Woodruff* vs. *Parham*, and *Hinson* vs. *Lott*.—"may be imposed by a State on all sales made within the State, whether the goods sold were the produce of the State imposing the tax, or of some other State, provided the tax imposed is uniform; but the court at the same time decides in both cases that a tax discriminating against the commodities of the citizens of other States of the Union would be inconsistent with the provisions of the Federal constitution, and that the law imposing such a tax would be unconstitutional and invalid. Such an exaction, called by what name it may be, is a tax upon the goods or commodities sold, as the seller must add to the price to compensate for the sum charged for the license, which must be paid by the consumer, or by the seller himself; and in either event the amount charged is equivalent to a direct tax upon the goods or commodities." * * * *

"Grant that the States may impose discriminating taxes against the citizens of other States, and it will soon be found that the power conferred upon Congress to regulate inter-State commerce is of no value, as the unrestricted power of the States to tax will prove to be more efficacious to promote inequality than any regulations which Congress can pass to preserve the equality of right contemplated by the Constitution among the citizens of the several States. Excise taxes, it is everywhere conceded, may be imposed by the States, if not in any sense discriminating; but it should not be forgotten that the people of the several States live under one common Constitution, which was ordained to establish justice, and which, with the laws of Congress, and the treaties made by the proper authority, is the supreme law of the land; and that that supreme law requires equality of burden, and forbids discrimination in State taxation when the power is applied to the citizens of the other States. Inequality of burden, as well as the want of uniformity in commercial regulations, was one of the grievances of the citizens under the confederation; and the new Constitution was adopted, among other things, to remedy those defects in the prior system."

"Evidence to show that the framers of the Constitution intended to remove those great evils in the government is found in every one of the sections of the Constitution already referred to, and also in the clause which provides that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another, showing that Congress, as well as the States, is forbidden to make any discrimination in enacting commercial or revenue regulations. Strong support to the same view is also derived from the succeeding clause in the same section of the Constitution, which provides that vessels bound to or from a State shall not be obliged to enter, clear or pay duties in another."

"Important as these provisions have been supposed to be, still it is clear that they would be comparatively valueless, if it should be held that each State possesses the power in levying taxes for the support of its own government, to discriminate against the citizens of every other State of the Union."

"Much consideration was given to these clauses of the Constitution in the *Passenger Cases*, and they were there regarded as limitations upon the power of Congress to regulate commerce, and as intended to secure entire commercial equality, and also as prohibitions upon the States to destroy such equality by any legislation prescribing any conditions upon which vessels bound from one State to another shall be permitted to enter the ports of another State. Congress, said Mr. Justice Grier, has regulated commerce by willing that it shall be free, and it is therefore not left to the discretion of each State either to refuse a right of passage through her tetritory or to exact a duty for permission to exercise such a privilege."

"Viewed in any light, the court is of the opinion that the statute in question imposes a discriminating tax upon all persons trading in the manner described, in the district mentioned in the indictment, who are not permanent residents in the State, and that the statute is repugnant to the Federal Constitution and invalid for that reason."

We think that the principle deducible from these three cases, must necessarily lead to a decision against the constitutionality of the act in question here; since the necessary inevitable result of the enactment of a system of laws, such as would be sanctioned and invited by an opposite decision, would be to discriminate in the most onerous and oppressive manner against inter-State commerce.

But, even were this not so, we contend:

THIRD, *That the law in question conflicts with the legislation of Congress regulating commerce among the several States, and that it is, therefore, unconstitutional and void.*

The argument on behalf of the defendant in error is based upon the assumption that Congress has not made any regulations upon this subject with which the State law can come into conflict. This we do not understand to be the case. We think the act of Congress of June 15, 1866, is such an exercise of the supreme legislative authority of the Nation upon the subject of inter-state commerce, as removes it entirely beyond the interference of the State Legislatures. As the act is brief, we insert it here in full. It is entitled "*An Act to facilitate commercial, postal and military communication among the several States*," and is as follows:

"WHEREAS, The Constitution of the United States confers upon Congress, in express terms, the power to regulate commerce among the several States, to establish post roads, and to raise and support armies; therefore,

"*Be it enacted*, &c., That every railroad company in the United States, whose road is operated by steam, its successors and assigns, be and is hereby authorized to carry upon and over its road, boats, bridges and ferries, all passengers, troops, government supplies, mails, freight and property, on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination: *Provided*, That this act shall not affect any stipulation between the government of the United States and any railroad company for transportation or fares without compensation, nor impair or change the conditions imposed by the terms of any act granting lands to any such company to aid in the construction of its road, nor shall it be construed to authorize any railroad company to build any new road or connection with any other road without authority from the State in which said railroad or connection may be proposed.

"SEC. 2. That Congress may at any time alter, amend or repeal this act."—Statutes at Large, 1865–6, p. 66.

That this act is, in intention and effect, a regulation of commerce among the several States cannot, we think, be disputed. This is shown in the title, in the preamble, and in the body of the act It is intended to facilitate commercial communication among the several States, and it is expressly put upon the constitutional power of Congress to regulate commerce among the several States. And this is done by authorizing every railroad company in the Union operated by steam, to carry passengers, freight, property, &c., on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines. Nor can it, we submit, be doubted that the tax law in question in this case, considered as one of a series extending throughout all the States, which a decision in favor of this one would sanction, conflicts with this regulation. The right of every railroad company to carry freight, for compensation, on its way from any State to another State, over its road, implies the right of the owners of such freight to have it thus carried, on the payment of such compensation as the company is willing to receive. And the exercise of these rights as thus given cannot lawfully be made subject, by the State Legislatures, to the additional burden of the payment, in each State into or through which such freight may pass, of such additional sum by way of tax, as each State may choose to exact.

We think the case of *Gibbons* vs. *Ogden*, 9 Wheaton, 1, is a direct authority for this position. The State law granting the exclusive right to navigate the waters of New York was there held unconstitutional and void, as against vessels licensed to carry on the coasting trade under the provisions of an act of Congress. Marshall, C. J., after examining the provisions of the act, and showing that they amount to the grant of a license to such ships or vessels as comply with their requirements, to carry on the coasting trade, says: "The word "license" means permission, or authority; and a license to do any particular thing is a permission or authority to do that thing, and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer, to do whatever is within the terms of the license." * * * * *

"The license must be understood to be what it purports to be, a legislative authority to the steamboat Bellona, to be employed in carrying on the coasting trade, for one year from its date."

The only point which Chief Justice Marshall seems to consider it necessary to establish is that the authority granted is as ample when contained in a license, obtained in pursuance of an act of Congress, as it would have been if contained in the act itself. Here the authority is contained in the act, and, understanding it to be what it purports to be, it is a legislative authority to the railroad company, plaintiff in error, and other like companies, "to carry upon and over its road, boats, bridges and ferries, all passengers, troops, government supplies, mails, freight and property, on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States, so as to form continuous lines for the transportation of the same to the place of destination."

This is the authority granted; it is granted by one who has power to grant it. If, then as Marshall, C. J., says, "it transfers all the right which the grantor can transfer, to do what is within the terms of the license," the grantor here having supreme authority over the subject matter of the grant, it must necessarily follow that no subordinate power can attach any conditions or burdens to the exercise of the right. This position is not, as we think, affected by the fact that the railroad companies pay nothing to the United States for the authority granted by the act. The right of the importer to sell foreign goods without paying a State license is as perfect as to goods upon which no duty is paid, as it is in respect to those upon which duty is charged.

We consider the principles established in *Brown* vs. *Maryland*, 12 Wheaton, 419, according to which the importer, having authority from the United States, by a compliance with all the regulations on the subject established by Congress, to import goods, could not be taxed for the exercise of the right to sell, to be applicable here, although nothing was said in the acts of Congress in regard to sale. It was considered that Congress, having legislated on the general subject, must be held to have made all the regulations which it was intended should be attached to the full exercise of the authority granted.

We think, also, that *The Passenger Cases* are authority for the same proposition. So, too, *Pennsylvania* vs. *The Wheeling Bridge Company*, 13 Howard, 518. This case, as has been said, "reaffirms, in the most emphatic manner, the doctrines of *Gibbons* vs. *Ogden*, and directly and pointedly holds that the national legislation need only embrace, in a very general and incidental manner, the subject matter covered by the State law. Here Congress had never uttered a word or promulgated a rule respecting bridges; it had only recognized the Ohio as a navigable stream, upon which commerce is carried on. Yet this recognition was deemed a sufficient act under the power to regulate commerce, and thereby the State authority to erect a bridge which should interfere with that commerce was destroyed."—*Pomeroy's Const. Law*, Sec. 366. And if this was the case in respect to a bridge, a subject as we have seen, more especially left within the power of the States, much more would the doctrine apply to the greatly more extended and national subject of railroads. We may here add that the very fact that Congress has, in the avowed exercise of its power to regulate commerce among the several States, legislated in the manner shown above, seems to prove that the transportation of freight and passengers from State to State is considered to be one of those subjects which are "in their nature national," and which "admit of one uniform system or plan of regulation." And this would seem to have been the view held by Mr. Justice Miller, who, delivering the opinion in the Circuit court, in *Gray* vs. *The Clinton Bridge*, 7 Am. L. Reg., (N. S.,) 149, says: "It seems to me that when these roads become parts of great highways of our Union, transporting a commerce which embraces many States, and destined, as some of these roads are, to become the channels through which the nations of Europe and Asia shall interchange their commodities, there can be no reason to doubt that *to regulate them is to regulate commerce, both with foreign nations and among the States;* and that to refuse to do this is a refusal to discharge one of the most important duties of the Federal government. As already intimated, the shackles with which the several States fettered commerce, in their selfish efforts to benefit themselves at the expense of their confederates, was one of the main causes which led to the formation of our present Constitution. The wonderful growth of that commerce since it has been placed exclusively under the control of the Federal government, has justified the wisdom of our fathers. But are we to remit the most valuable part of that commerce again to the control of the States, and to all the consequent vexations and burdens which the States, through whose territories it must be carried on, may impose?

And must all this be permitted because the carrying is done by a method not thought of when the Constitution was framed?"

But we must not overlook the argument and ground upon which the Supreme Court of the State have based their decision in favor of the constitutionality of this tax law. It certainly has the merit of novelty, and if it be sound, then all who have heretofore discussed this question have been wide of the mark.

The ground of the decision is thus stated by Agnew, J., delivering the opinion of the court, (Reed, J., dissenting):

"Among the most important reserved State rights, and one directly connected with the question before us, is that of eminent domain. * * * * *

"Under this invaluable power the States have built up a net work of railways and canals, and have improved natural channels, through which the commerce of the whole Union is coursing, like the life blood throughout the natural system. This was not done under any supposed authority to regulate inter-State commerce, or to aid in the execution of the federal power over commerce between the States; but was done under the unquestioned power of the State to improve her own resources, and to regulate her internal affairs. Yet does any one doubt the grand and beneficial impulse given to inter-State commerce by this exercise of State power? And who can doubt that the State has a right to compensation for this expenditure of her means, and the benefit he has conferred on all who use her works? They were built by herself, under her franchises, and the right to exact tolls, charges and fares for their use, is a necessary consequence of her power to construct them. Nor does it make any difference what form her compensation takes—whether that of a direct charge on the tonnage using the road, or that of a tax on the corporations who use her franchises—her right is to exact the compensation rom those who use the works. To gainsay this is to deny her right of eminent domain, and her power to legislate upon her internal affairs, and the creations of her own sovereignty."

"If these works were, as once some of them were, in her own hands, what provision in the Federal Constitution would forbid her to increase her revenue by an increase of the charge of transportation over them? When in the hands of creatures exercising her franchises, what clause in any instrument forbids her to tax the franchises, and to authorize the tax to be added to the preexisting tolls and charges? To legislate once, is not to exhaust her power over the subject of tolls or charges, but to legislate at all is to assert her power. Whether it be called a toll or tax, what is this but to increase a charge which she can rightfully demand? The right to demand any toll or charge upon all articles transported, or fares for passage, is derived from her grant, and the power to determine their extent depends on her discretion. It is a right of which she cannot be deprived, and of which she is the only judge, unless, perhaps, the power should be so unreasonably and oppressively exercised as to afford evidence of a design, by a fraudulent use of the power, to interdict or ruinously affect the commerce of the other States. To say, because her citizens engage in mining for an extra territorial market, or because merchandise may pass over these works out of or into the State, that to exact tolls and charges for the minerals or merchandise transported over them, or to tax the franchises of those engaged in the work, is a regulation of commerce, is to confound all just distinctions and to destroy the most sacred right of a State. Her power to levy revenue from transportation over these works may be seen in her power over the works themselves. If compensation were denied her by way of revenue, who can dispute her power to suffer her own works to fall into decay and ruin; or, when unfettered by a charter contract, to repeal the charters under which they were built. Inter-State commerce might suffer, but what power could forbid the act?"

And, summing up in conclusion: "The case is not rested on the debatable ground of State power to regulate inter-State commerce in the absence of Congressional legislation on the same subject, but on the admitted right of a State to execute its power of eminent domain in the construction of works for the transportation of freight and passengers, and to legislate and tax their use by those who choose to employ them, as undoubted subjects of her domestic affairs and of that internal commerce which she can rightfully control so long as she does not fraudulently exercise her power to the injury of the citizens of other States."

The position here taken, as we understand it, is, that the State derives her right to tax these railroads, from the fact that they obtained their right of way by the aid of her power of eminent domain; and that this tax which falls upon the articles of commerce transported, or their owners, because she has authorized it to be added to the existing tolls and charges, is compensation for the use of these works so constructed, or in other words, a toll for the use of the works.

An obvious remark here is, that if this is a "tax or toll added to the pre-existing tolls and charges," it cannot be a tax upon the franchises of the corporation, since it does not pay, but instead receives, these "tolls and charges." We have, however, already seen, by an examination of the provisions of this statute, and the authorities bearing upon this point, that it is not a tax upon the franchises of the corporation, but upon the articles of commerce transported.

Now no one doubts the right and power of the State to tax the franchises of these corporations, and it is assuredly not necessary to invoke the aid of one undoubted power, to sanction the exercise of another. Indeed, so far as the exercise of the power of eminent domain has any influence on the power of taxation, it is to exempt from it, not to render liable to it. This is clearly seen by the numerous decisions rendered by the Supreme Court of Pennsylvania, which establish the doctrine, that the line of a railroad, and the ground occupied thereby, and the buildings necessary for the enjoyments of the franchises of the corporation, are exempt from taxation; and the ground of the doctrine is, that these are public works, which were taken for public use, under the Commonwealth's right of eminent domain.—See *Lackawana Iron Company* vs. *Luzerne County*, 40 Pa. St. R. (6 Wright) 424, where the cases are collected; and ***Railroad*** vs. ***M'Lanahen***, 59 Pa. St. R. (9 P. F. Smith) 29, where it is said that "this principle may now be considered as firmly established;" and it extends to taxation for State as well as for county purposes.—***Commissioners*** vs. ***Delaware and Hudson Canal Company***, 15 Pa. St. R. (3 Harris) 351.

The same principle is laid down, and for the same reason, in Massachusetts; ***City of Worcester*** vs. ***Western Railroad Company***, 4 Metc., 546, where Shaw, C. J., says: "Treating the railroad then as a public easement, the works erected by the corporation as public works, intended for public use, we consider it is well established that, to some extent at least, the works, necessarily incident to such public easement, are public works, and as such exempt from taxation." * * * "The only principle on which the Legislature could have authorized the taking of private property for its construction, without the owners' consent, is that it was for a public use."

It is true this principle only extends to the exemption from taxation of the line of the road, and the buildings erected thereon with the appurtenances; but it is equally true, that it is only as to these that the power of eminent domain has been granted by the State, and exercised on behalf of the corporation. So far then as the exercise of this power affects the question, its effect is directly the opposite of that ascribed to it by the State court, as is further shown by the fact that the real estate of other corporations, created by the State, to whom, however, the exercise of the right of eminent domain is not granted, is taxable the same as if owned by individuals.—40 Pa. St. R., *ut supra.* And the franchises of corporations, to whom the exercise of the right of eminent domain is not granted, are as taxable as are the franchises of those to whom it is.

We contend further that there is nothing in the argument that, as the State, if she owned these roads, might, if she chose, suffer them to fall into decay, and, when "unfettered by a charter contract," might "repeal the charters under which they were built;" she may, therefore, levy this tax as "compensation by way of revenue" upon inter-State commerce transported over them. To say nothing of the fact that where she has authorized such connections to be made with roads in other States as to establish inter-State lines of travel, she would probably be found without power to obstruct or destroy them, we think the premises assumed do not support the conclusion. It is equivalent to saying that because the State has created these corporations, she may through them tax, indirectly, subjects which she is forbidden to tax by the Constitution of the United States.

This argument was much pressed by counsel in support of the tax in question in *Bank Tax case*, 2 Wallace 200, as appears from pp. 201–2 of the Report; but it evidently met with no favor from the court. And it is evident that the State cannot, by creating instruments for the purpose, tax that which it would otherwise be unconstitutional for her to tax.

The further argument that this tax is merely a toll paid for the transportation of freight over the road, is, we think, equally incapable of being maintained. The State has no title to any part of the toll charged or earned upon the roads, since she has no ownership in them, nor does she furnish the transportation or render the service for which tolls and freights are charged. These are owned and provided by the corporation, to whom alone the tolls and charges belong.

Besides, there is a radical difference between a tax and a toll. A tax can be levied only for a public purpose; a toll may be and usually is a private charge. A tax is levied upon the ground of necessity, for the support of the government, and the only compensation required to be made in return for it is the general protection afforded by the government to its citizens; and there is no necessary relation between the value of this protection and the amount of tax levied. Indeed, a bad government is likely to demand more taxes than a good one. A toll is charged as an equivalent for some special advantage or privilege granted to the party who pays. To argue that because the State, if she owned these works, as she once did some of them, could make such charge for "transportation over them" as from time to time she deemed expedient and most productive of revenue, *therefore* she can *tax* inter-State commerce passing over them, when owned by her corporations, is, we think, to use the language of the learned judge, "to confound all just distinctions," and to draw conclusions not warranted by the premises assumed. Besides, if the argument be worth anything, it proves that the State has the same right, in its nature and its extent, "to levy revenue from transportation over these works," as she had before she sold them, and hence that the only thing she parted with by the sale, in return for which she received millions of dollars, was the burden of keeping the works in repair and furnishing the facilities for transportation. The truth is, there is no analogy between the right to tax and the right to charge toll, or compensation for transportation. The State cannot *tax* the United States, yet if she owned these works she could charge the United States the same *toll* for the use of them that she could charge any one of her private citizens for the same service. These corporations cannot *tax* the United States, yet they too have the same right to charge the United States with *toll* as they have to charge any individual. And, so far is it from being the case that the State has the right to charge anything in the nature of *toll* from those who use these works, these corporations have the same right to charge the State herself with *toll* as any one else, if she use the works.

Another consideration, which both illustrates the difference between a toll and a tax, and shows that the former is an element of commerce, and is regulated by the nature and extent of the commerce concerned, while the latter amounts to a regulation of commerce, is this: That the amount of the tolls and charges is determined by the amount and nature of the services rendered and the commercial facilities afforded, and is governed by the laws of trade, and of demand and supply, and is also a matter of contract between the shipper and the carrier, while taxes need not, and in this case do not, bear any relation or proportion to any of these things. No additional service is rendered because of them, they are not contracted for but are compulsory, the laws of demand and supply have nothing to do with them, nor have any other of the matters which form the consideration for the payment of tolls and freight by the shipper to the carrier or transporter.

Again, a State in levying a tax acts in the capacity of a sovereign, and exercises one of the fundamental rights of sovereignty. In taking tolls, where she is entitled to them, she acts in the capacity of an owner of the works or improvements for the use of which the toll is charged, and not in any proper sense as a sovereign. This is declared and illustrated in *State of Pennsylvania* vs. *The Wheeling Bridge Company*, 13 Howard, 518. The State of Pennsylvania filed a bill in chancery in this court, averring that she owned valuable public works, canals and railways, constructed at great expense as channels of commerce, for the transportation of passengers and goods, from which a large revenue as tolls was received by her, and that the Wheeling bridge would so obstruct the navigation of the Ohio river, with which her works connected, as to cut off trade and business from these works, and thus impair and diminish her tolls and revenues; and prayed an injunction against the erection of the bridge. In delivering the opinion of the court, Mr. Justice M'Lean, discussing the question of jurisdiction, and the standing of the State of Pennsylvania in court, says:

"When a State enters into a co-partnership, or becomes a stockholder in a bank or other corporation, its sovereignty is not involved in the business, but it stands and is treated as other stockholders or partners. And so in the present case, the rights asserted and the relief prayed are considered as in no respect different from those of an individual. From the dignity of the State, the Constitution gives to it the right to bring an original suit in this court. And this is the only privilege, if the right be established, which the State of Pennsylvania can claim in the present case."

And again: "On a question of disputed boundary between two States, although the inquiry of the court is limited to the establishment of a common line, yet the exercise of sovereign power over more or less territory may depend on the decision. This gives great dignity and importance to such a controversy, and renders necessary a broader view than on a question as to the mere right of property. But in the present case the State of Pennsylvania claims nothing connected with the exercise of its sovereignty. It asks from the court a protection of its property, on the same ground and to the same extent as a corporation or an individual may ask it."

This argument is filed on behalt of several other railroad companies, interested, with the plaintiff in error, in the question involved in this case, by leave of court, granted in the order made for the re-argument of the case.

J. W. SIMONTON,

Counsel for said companies.

APPENDIX.

AN ACT

To revise, amend and consolidate the several laws taxing corporations, brokers and bankers.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same,* That hereafter no institution or company, incorporated by or under any law of this Commonwealth, general or special, or of any other State, and authorized to do business in this State, shall go into operation without first having the name of the institution or company, the date of incorporation, the place of business, the amount of capital paid in, and the names of the president and treasurer of the same registered in the office of the Auditor General; and any such institution or company which shall neglect or refuse to comply with the provisions of this section shall be subject to a penalty of five hundred dollars, which penalty shall be collected on an account settled by the Auditor General and State Treasurer as taxes on capital stock are settled and collected.

SECTION 2. That hereafter it shall be the duty of the president or treasurer of every company incorporated by or under any law of this Commonwealth, except banks and savings institutions, and of all companies incorporated by any other State, and lawfully doing business in this Commonwealth, who are taxable under the laws of this State, to make report in writing to the Auditor General annually, in the month of November, stating specifically the amount of capital paid in, the date, amount and rate per centum of each and every dividend declared by their respective corporations during the year ending with the first Monday of said month; and in all cases where any such company shall fail to make and declare any dividend during the year ending as aforesaid, the treasurer and secretary thereof, after being duly sworn or affirmed to do and perform the same with fidelity, according to the best of their knowledge and belief, shall, between the first and fifteenth days of November of each year in which no dividend has been declared as aforesaid, estimate and appraise the capital stock of such company at its actual value in cash, and when the same shall have been so estimated and appraised, they shall forthwith forward a certificate thereof to the Auditor General, accompanied by a copy of their said oath or affirmation, by them signed, and attested by the magistrate or other person qualified to administer the same.

SECTION 3. That if the said officers of any such company or corporation shall neglect or refuse to furnish the Auditor General, on or before the thirty-first day of December in each and every year, with the report aforesaid, or the report and appraisement, as the case may be, as required by the second section of this act, it shall be the duty of the accounting officers of this Commonwealth to add ten per centum to the tax of said corporation for each and every year for which such report or report and appraisement were not so furnished, which percentage shall be settled and collected with the said tax in the usual manner of settling accounts and collecting such taxes: *Provided*, That if said officers of any such company or corporation shall fail to comply with the provisions of the second section of this act for three successive years, the Auditor General may, if he deems it conducive to the public interest, report the fact to the Governor, who shall thereupon, by proclamation, declare the charter of said company or corporation forfeited and their chartered privileges at an end.

SECTION 4. That the capital stock of all companies whatever, incorporated by or under any law of this Commonwealth, or incorporated by any other State, and lawfully doing business in this Commonwealth, or that may be hereafter incorporated, except banks and savings institutions and foreign insurance companies licensed in pursuance of the general acts in relation thereto, shall be subject to and pay a tax into the treasury of the Commonwealth annually, at the rate of one-half mill for each one per cent. of dividend made or declared by such company; and in case of no dividend being made or declared by such company, then three mills upon a valuation of the capital stock of the same, made in accordance with the provisions of the second section of this act: *Provided*, That companies liable to tax on dividends in addition to tax on capital stock, prior to the act approved April twelfth, one thousand eight hundred and fifty-nine, entitled "An Act to equalize taxation upon corporations," shall from the said date be exempt from any tax on dividends: *Provided further*, That building associations, plank road or turnpike companies, shall not be liable for any tax to the Commonwealth when such companies make or declare no dividends.

SECTION 5. That the amount of tax on capital stock imposed by the preceding section of this act, shall be retained and deducted by the treasurer or other officer having charge of any company or corporation as aforesaid, from the dividends or profits made or declared as aforesaid, and he is hereby authorized and required, on or before the fifteenth day of January then next, to transmit to the treasury of the Commonwealth the amount of said tax; and if in case where no dividend has been made or declared the funds of such company, subject to the control of the treasurer at the period when the value of said capital stock shall be appraised, as required by the second section of this act, shall be insufficient to pay the tax aforesaid, it shall be the duty of the said treasurer or other officer forthwith to give notice to the stockholders of such company of the amount required on each share of stock by them respectively held, to enable the said treasurer to pay the tax aforesaid; and if any such stockholder shall neglect or refuse to pay the amount so required for the period of thirty days from the time of such notice, the said treasurer shall, after giving two weeks' public notice thereof in one or more newspapers published in or nearest to the county in which such company or its principal place of business is located, proceed to sell at public sale and transfer to the purchaser, so many shares of the stock of such delinquent stockholder as may be necessary to pay his portion of the tax required to be paid as aforesaid; and if any company incorporated as aforesaid shall neglect or refuse to pay the tax hereinbefore required to be paid, the directors, managers or treasurers thereof, for the time being, shall be jointly and severally liable in their individual capacity for the payment thereof, and the same may be sued for and recovered under the direction of the State Treasurer, as debts of like amount are recoverable. (1)

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(1) Act April 12, 1859.

SECTION 6. That every private banker and broker, and every unincorporated banking and saving institution and express company, and all corporations incorporated by or doing business in this Commonwealth, except those liable to a tax on tonnage under the provisions of this act, and foreign insurance companies licensed in pursuance of the several acts in relation thereto, except banks and savings institutions incorporated by this State, shall annually, upon the first day of November of each year, make report to the Auditor General, under oath or affirmation, setting forth the entire amount of net earnings or income received by said individuals, company or corporation, from all sources during the preceding year; and upon such net earnings or income the said individuals, company or corporation, as the case may be, shall pay to the Treasurer, for the use of the State, within sixty days thereafter, three per centum upon such annual net earnings or income, in addition to the taxes imposed by the preceding sections of this act; and in case any corporation, company or individual, shall neglect or refuse to make the report required by this section, to the Auditor General, on or before the thirty-first day of December, such corporation, company or individual shall be liable to a penalty of ten per centum for such neglect, which shall be added to the amount of tax found due in the settlement of their account. (1)

SECTION 7. That the president, treasurer, cashier or other financial officer of every railroad company, steamboat company, canal company, and slackwater navigation company, and all other companies now or hereafter doing business in this State, and upon whose works freight may be transported, whether by such company or by individuals, and whether such company shall receive compensation for transportation, for transportation and toll, or shall receive tolls only, except turnpike, plank road and bridge companies, shall within thirty days after the first days of January, April, July and October, of every year, make return in writing to the Auditor General, under oath or affirmation, stating fully and particularly the number of tons of freight carried over, through or upon the works of said company for the three months immediately preceding each of the above mentioned days; and each of said companies, except as aforesaid, shall at the time of making such return pay to the State Treasurer, for the use of the Commonwealth, on each two thousand pounds of freight so carried, tax at the following rates, viz: First. On the product of mines, quarries and clay beds, in the condition in which said products may be taken therefrom, two cents. Second. On hewn timber, animal food, including live stock, also on the products of the forest, vegetable and other agricultural products, the value of which has not been increased by labor, three cents. Third. On all other articles, five cents; when the same freight shall be carried over and upon different but continuous lines of transportation, said freight shall be chargeable with tax as if it had been carried but upon one line; and the whole tax shall be paid by such one of said companies, upon whose works the freight originated, but in such case the tax shall be borne by the several corporations upon whose works the said tonnage was transported, each in proportion to the distance carried, as may be adjusted among themselves; corporations, whose lines of improvement are used by others for the transportation of freight, and whose only earnings arise from tolls charged for such use, are authorized to add the tax hereby imposed to said tolls, and collect the same therewith; but in no case shall tax be twice charged on the same freight carried on or over the same line of improvements. (2)

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(1) Act April 30, 1864.

(2) Act August 25, 1864.

SECTION 8. That in addition to the taxes provided for as aforesaid, every railroad, canal and transportation company liable to tax upon tonnage, under the preceding section of this act, shall pay to the Commonwealth a tax of three-fourths of one per centum upon the gross receipts of said company; the said tax shall be paid semi-annually, upon the first days of July and January, and for the purpose of ascertaining the amount of the same, it shall be the duty of the treasurer or other proper officer of said company, to transmit to the Auditor General, at the dates aforesaid, a statement, under oath or affirmation, of the amount of gross receipts of the said company derived from all sources during the preceding six months; and if any such company shall neglect or refuse, for a period of thirty days after such tax becomes due, to make said return, or to pay the same, the amount thereof, with an addition of ten per centum thereto, shall be collected for the use of the Commonwealth, as other taxes are recoverable by law from said companies: *Provided*, That the revenue derived under this section shall be applied to the payment of principal and interest of the debt contracted under the act of the fifteenth of May, Anno Domini one thousand eight hundred and sixty-one, entitled "An Act to create a loan, and to provide for arming the State." (1)

SECTION 9. That every railroad, canal or transportation company doing business in this State, which possesses the right to mine anthracite coal, or to purchase and sell the same, or to lease from or to other parties the land or mines from which said coal is taken, shall quarterly, on the first days of January, April, July and October, make report, under oath or affirmation, stating the amount of coal mined by them from property owned and leased by them, and also the amount of coal purchased by them, or mined from property owned by them that may be leased to other parties during the preceding three months, and shall pay to the State Treasurer, for the use of the Commonwealth, within thirty days thereafter, a tax of four cents upon each and every ton of anthracite coal so purchased or mined: *Provided*, That the amount of coal consumed in the transaction of their business shall not be included in their return: *And provided further*, That said corporations shall be exempt from the payment of the tax upon tonnage imposed by the seventh section of this act, upon all coal upon which a tax shall be paid under the provisions of this section, and also from the tax on net earnings or income imposed by the sixth section of this act, and also from the tax upon gross receipts imposed by the eighth section of this act, so far as their net earnings and gross receipts are derived from the mining, transportation and sale of the said coal: *And provided also*, That if any corporation shall fail to make the return required by this section, within thirty days after the time herein specified, they shall be liable to a penalty of ten per centum for such neglect, the said penalty to be added to the amount of tax found due under the provisions of this section, upon settlement made by the Auditor General and State Treasurer in accordance with law. (2)

SECTION 10. That it shall be the duty of the cashier of every bank and savings institution, incorporated under the laws of this State, to collect annually from every shareholder of said bank or savings institution a tax of one per centum upon the par value of the shares held by said shareholder, and to pay the same into the State Treasury on or before the first day of July in every year; and the said shares shall be exempt from all other taxation under the laws of this Commonwealth.

SECTION 11. That the president, treasurer or cashier of every company, except bank or savings institution incorporated under the laws of this

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(1) Act February 25, 1866.

(2) Act March 22, 1867.

Commonwealth, doing business in this State, which pays interest to its bondholders or other creditors, shall before the payment of the same, retain from said bondholders or credirors a tax of five per centum upon every dollar of interest paid as aforesaid; and shall pay over the same semi-annually, on the first days of July and January in each and every year, to the State Treasurer for the use of the Commonwealth; and every president, treasurer or cashier as aforesaid shall annually, on the thirty-first day of each December, or within thirty days thereafter, report to the Auditor General, under oath or affirmation, stating the entire amount of interest paid by said corporation to said creditors, during the year ending on that day; and thereupon the Auditor General and State Treasurer shall proceed to settle an account with said corporation as other accounts are now settled by law; and in the settlement of said accounts the persons aforesaid shall be allowed the same commission or compensation as is now allowed by law to county treasurers; and in case the said president, treasurer or cashier shall neglect or refuse to make the report required by this section, within sixty days after the time specified, he shall forfeit to the State the amount of his commission for such failure or neglect: *Provided*, That the principal sums from the interest of which the said tax is deducted shall not be assessed and taxed for State purposes in the valuation of personal property, or returned by county commissioners to the board of revenue commissioners. (1.)

SECTION 12. That in the settlement of all accounts for taxes due the Commonwealth under the preceding sections of this act, by corporations or individuals, the Auditor General and State Treasurer shall charge interest upon the balance or balances found due the Commonwealth by such corporations or individuals, at the rate of twelve per centum per annum from the time said taxes became due and payable to the time of the settlement of the same; and all balances due the Commonwealth by the corporations or individuals aforesaid on accounts settled agreeably to the provisions of the act of March thirtieth, one thousand eight hundred and eleven, or any other act of assembly, shall bear interest from sixty days after date of settlement, at the rate of twelve per centum per annum, until the same are paid: *Provided*, That the payment of interest, as aforesaid, shall not relieve said corporations or individuals from any of the penalties prescribed for neglect and refusal to furnish reports to the Auditor General.

SECTION 13. That the Auditor General and State Treasurer, or any agent appointed by them, are hereby authorized to examine the books and papers of any corporation, association, company, private banker or broker, to verify the accuracy of any return made to them, or either of them, under the provisions of this act.

SECTION 14. That the revenue derived from tax on net earnings or income, under the sixth section of this act, and from tonnage, under the seventh section, and from coal mined under the ninth section, shall so far as it is necessary be first applicable to the payment of the ordinary expenses of government, and the residue, not needed for such purpose, shall be transferred to the sinking fund, as directed by the act of the twenty-second of April, one thousand eight hundred and fifty-eight.

SECTION 15. That hereafter every company incorporated by or under any general or special law of this Commonwealth, except railroad, canal, turnpike, bridge or cemetery companies, and companies incorporated for literary, charitable or religious purposes, shall pay to the State Treasurer, for the use of the Commonwealth, a bonus of one-quarter of one per centum upon the

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(1.) Act April 30, 1864.

amount of capital stock which said company is authorized to have, in two equal instalments, and a like bonus upon any subsequent increase thereof. The first instalment shall be due and payable upon the incorporation of said company, or upon the increase of the capital thereof, and the second instalment one year thereafter; and no company as aforesaid, shall have or exercise any corporate powers until the first instalment of said bonus is paid; and the Governor shall not issue letters patent to any company until he is satisfied that the first instalment of said bonus has been paid to the State Treasurer; and no company incorporated by any special act of assembly shall go into operation, or exercise any corporate powers or privileges, nor shall said act be enrolled among the laws of the State, until said first instalment of bonus has been paid as aforesaid.

SECTION 16. The following acts of assembly and parts thereof, so far as the same are altered and supplied by this act, be and the same are hereby repealed.

Section first of the act approved June eleventh, one thousand eight hundred and forty, to create additional revenue, to be applied towards the payment of interest and extinguishment of the debts of the Commonwealth.

Section thirty-three of the act approved April twenty-ninth, one thousand eight hundred and forty-four, to reduce the State debt, and to incorporate the Pennsylvania canal and railroad company.

Sections seventy-one and seventy-two of the act approved May seventh, one thousand eight hundred and fifty-five, to provide for the ordinary expenses of government, the repairs of the public canals and railroads, and other general and special appropriations.

An act approved April twenty-first, one thousand eight hundred and fifty-eight, for the better securing to the Commonwealth the payment of taxes due by incorporated companies.

An act approved April twelfth, one thousand eight hundred and fifty-nine, to equalize taxation upon corporations.

The first, second, third, fifth and sixth sections of an act approved April thirtieth, one thousand eight hundred and sixty-four, imposing additional taxes for State purposes, and to abolish the revenue board.

The first, second and third sections of the act approved February twenty-third, one thousand eight hundred and sixty-six, to amend the revenue laws of the Commonwealth.

An act approved April ninth, one thousand eight hundred and sixty-seven, regulating interest on public accounts.

An act approved March twenty-second, one thousand eight hundred and sixty-seven, to increase the revenues of the Commonwealth.

ELISHA W. DAVIS,
Speaker of the House of Representatives.

JAMES L. GRAHAM,
Speaker of the Senate.

APPROVED—The first day of May, Anno Domini one thousand eight hundred and sixty-eight.

JNO. W. GEARY.

CONSTITUTIONALITY OF STATE LAWS TAXIN
FREIGHTS AND GROSS RECEIPTS
OF CORPORATIONS.

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List of State acts held to be Unconstitutional.

The following table exhibits, in separate classes, the State laws affecting commerce which have been held to be unconstitutional and those which have been sustained, showing the substance of each act, its date, the case in which it was reviewed, the names of the judges delivering the opinions and the pages of this paper book at which the analysis of the case may be found:

Laws referred to.	Case in which the law was reviewed.	Page of analysis.
New York, acts granting to Livingston and Fulton exclusive right to navigate all the waters of New York with boats moved by fire and steam.	Gibbons vs. Ogden, 9 Wheat., 1, (1824.) Opinion by Marshall, C. J. Johnson, J., dissenting.	1
Maryland, act of 1821, requiring an importer of foreign goods to take out a license before selling.	Brown vs. Maryland, 12 Wheaton, 419, (1827.) Opinion by Marshall, C. J. Thompson, J., dissented.	6
Pennsylvania, acts of taxation as applied to salary of an officer of the United States.	Dobbins vs. Commissioners of Erie Co., 16 Peters, 435, (1842.) Opinion by Wayne, J.	17
Acts of New York and Massachusetts, imposing a tax upon alien passengers arriving in port.	Smith vs. Turner, 7 Howard, 283, (1849.) Norris vs. the city of Boston, 7 Howard, 464. Opinions by M'Lean, J., Wayne, J., Catron, J., M'Kinley, J., Grier, J. Mr. Chief Justice Taney, Daniel J. Nelson, J., and Woodbury, J., dissented.	19
Act of Virginia, authorizing the building of a bridge over a navigable stream.	Pennsylvania vs. the Wheeling Bridge Co., 9 How., 647, 11 How., 528, 13 How., 518, 18 How., 421, (1849-1855.) Opinion by M'Lean, J., Taney, C. J., and Daniel, J., dissented.	25
California, statute imposing a tax on vessels temporarily within its limits with their situs at the home port.	Hays vs. the Pacific Mail Steamship Co., 17 Howard, 596, (1854.) Opinion by Nelson, J. Daniels, J., dissented.	31
Act of Missouri of 1855, requiring merchants dealing in the manufactures of other States to take out a license.	State vs. North, 27 Missouri, 465, (1858.) Opinion by Judge Scott. Judge Napton dissented.	33
California, statute imposing a tax upon bills of lading for gold and silver transported from the State.	Almy vs. California, 24 Howard, 169, (1860.) Opinion by Taney, C. J.	36
New York, statute imposing a tax on stocks, bonds and securities of the United States held by a bank.	Bank of Commerce vs. New York City, 2 Black, 620, (1862.) Opinion by Nelson, J.	38
Act of New Jersey of Mar. 28, 1862, imposing a distinctive tax on a transportation of goods from State to State.	Erie Railway Company vs. the State of New Jersey, 2 Vroom, 533, (1864.) Opinion by Beasley, C. J.	40
Louisiana, statute of 1855, enacting that the master and wardens of a port shall receive five dollars for every vessel arriving in the harbor.	Steamship Company vs. Port Wardens, 6 Wallace, 31, (1867.) Opinion by Chase, C. J.	44

Laws referred to.	Cases in which the law was reviewed.	Page of analysis.
Louisiana, statute of 1865, imposing a tax on property brought from another State for sale.	Louisiana vs. Kennedy, 19 Louisiana Ann. Reps., 397, (1867.) Opinion by Taliaferro, J.	46
Nevada, statute of 1865, imposing a tax on every person leaving the State by railroad or stage.	Crandall vs. Nevada, 6 Wallace, 35, (1867.) Opinion by Miller, J.	55
Delaware, statute of 1869, imposing a tax upon locomotives passing through the State.	Minot vs. Philadelphia, Wilmington and Baltimore R. R. Co., (C. C. U. S. District of Delaware,) 3 Am. Law Times Reports, p. 193, (1870.) Opinion by Strong, J.	60
Maryland, statute of 1818, imposing a tax on all banks or branches thereof in the State, not chartered by the Legislature.	M'Cullough vs. Maryland, 4 Wheaton, 316, (1819.) Opinion by Marshall, C. J.	64
New York, statute of 1811, impairing the obligations of contracts.	Sturges vs. Crowninshield, 4 Wheaton, 122, (1819.) Opinion by Marshall, C. J.	67
Ohio, statute of 1852, imposing a higher tax on a bank than is stipulated in its charter.	Dodge vs. Woolsey, 18 Howard, 331, (1855.) Opinion by Wayne, J. Daniel, J., and Catron, J., dissented.	96
The authority of a process of a State court or a judge beyond the limits of the sovereignty which confers the judicial power.	Ableman vs. Booth, 21 Howard, 506, (1858.) Opinion by Taney, C. J.	99
New York, statute of April 29, 1863, laying a tax on the capital stock of a bank which is invested in Federal bonds.	Bank Tax Case, 2 Wallace, 200, (1864.) Opinion by Nelson, J.	109
Maryland, statute imposing a license tax upon citizens of other States greater than on her own citizens.	Elias Ward vs. the State of Maryland. Legal Intelligencer, Jan. 12, 1872, p, 5, (1871.) Opinion by Clifford, J.	126

The following State Laws have been sustained as Constitutional.

Law.	Decision sustaining it.	Page of analysis.
New Jersey, statute of June 9, 1820, limiting the right of raking oysters to the inhabitants of that State.	Corfield vs. Coryell, 4 Washington, C. C. R., 379, (1824.) Opinion by Washington, J.	4
Delaware, statute of 1822, authorizing the building of a dam across a navigable stream.	Wilson vs. Blackbird Creek Co., 2 Peters, 245, (1829.) Opinion by Marshall, C. J.	11
New York, act of 1824, requiring the captain of every vessel arriving from a foreign port to report a list of all passengers.	City of New York vs. Miln, 11 Peters 102, (1837.) Opinions by Barbour, J., and Thompson, J., Story, J., dissenting.	13
Pennsylvania, statute of 1803, requiring every vessel without a pilot to pay a certain penalty.	Cooley vs. the Board of Wardens, 12 Howard, 311, (1851.) Opinion by Curtis, J., M'Lean, J., and Wayne, J., dissented.	29

Law.	Decision sustaining it.	Page of analysis.
Pennsylvania, statute of 1857, authorizing a bridge to be erected over a river entirely within the limits of the State.	Gilman vs. Philadelphia, 3 Wallace, 713, (1865.) Opinion by Swayne, J., Clifford, J., Wayne, J., and Davis, J., dissented.	42
Alabama, statute of 1866, imposing the same tax on all liquors brought into the State as those manufactured in the State.	Hinson vs. Lott, 8 Wallace, 152, (1868.) Opinion by Miller, J. Nelson, J., dissented.	56
Alabama, statute imposing a uniform tax on all sales, whether made by its own citizens or the citizens of another State.	Woodruff vs. Parham, 8 Wallace, 123, (1868.) Opinion by Miller, J. Nelson, J., dissented.	58
New Jersey, statute compelling its inhabitants to become citizens thereof.	M'Ilvaine vs. Coxe's Lessee, 4 Cranch, 208, (1808.) Opinion by Cushing, J.	63
Pennsylvania, statute imposing a tax on the vendors of foreign merchandise.	Biddle vs. the Commonwealth, 13 S. and R., 405, (1825.) Opinion by Tilghman, C. J.	69
Pennsylvania, statute imposing a penalty on officers and privates of the State militia who refuse or neglect to serve when called into actual service in pursuance of an order of the President.	Houston vs. Moore, 5 Wheaton, 1, (1829.) Opinion by Washington, J.	70
New York, statute regulating ferries within its limits.	People vs. Babcock, 11 Wendell, 586, (1834.) Opinion by Nelson, J.	72
Connecticut, statute authorizing a company to improve the navigation of a river, and to take tolls for every vessel passing up or down.	Kellogg vs. the Union Company, 12 Conn., 7, (1837.) Opinion by Bissell, J.	73
Kentucky, statute of November 20, 1820, establishing the Bank of Kentucky, and authorizing it to issue notes, &c.	Briscoe vs. Bank of Kentucky, 11 Peters, 257, (1837.) Opinion by M'Lean, J. Story, J., dissented.	75
Mississippi, statute forbidding the importation of slaves from any other State.	Groves et al. vs. Slaughter, 15 Peters, 449, (1841.) Opinions by Taney, C. J., Thompson, J., and M'Lean, J. Baldwin, J., dissented.	76
Connecticut, statute of May, 1805, imposing reasonable tolls for improving the navigation of a river within its border.	Thames Bank vs. Lovell, 18 Conn., 500, (1847.) Opinion by Church, C. J.	78
City ordinance of Galveston, Texas, imposing a tax on every passenger arriving at its port.	Smith vs. Marston, 5 Texas, 426, (1849.) Opinion by Lipscomb, J.	80
Louisiana, statute of Mar. 26, 1842. imposing a tax upon all money or exchange brokers.	Nathan vs. Louisiana, 8 Howard, 73, (1850.) Opinion by M'Lean, J.	83
Maine, statute of July 30, 1846, granting the exclusive navigation of a river to a company that was to improve it.	Veazie et al. vs. Moor, 14 Howard, 568, (1852.) Opinion by Daniel, J.	84
Ohio, statute of 1851, imposing a tax on a bank where the Legislature had not expressly bound the State by contract.	Ohio Life Insurance and Trust Co. vs. Debolt, 16 Howard, 416, (1853.) Opinion by Taney, C. J. Swayne, J., Curtis, J., and Nelson, J., dissented.	86
New Jersey, statute of 1799, authorizing the appointment of a board of freeholders to fix the rates of ferries.	Freeholders vs. the State, 4 Zabriskie, 718, (1853.) Opinion by Elmer, J.	88
An ordinance of the city of Savannah, imposing a tax upon the gross amount of sales of all negroes, goods wares and merchandise sold within corporate limits of the city.	Paddelford, Fay & Co. vs. Savannah, 14 Georgia, 438, (1854.) Opinion by Benning, J.	90

Law.	Decision sustaining it.	Page of analysis.
Massachusetts, statute authorizing the building of a toll bridge over a navigable stream.	Commonwealth vs. the New Bedford Bridge Co., 2 Gray, 339, (1854.) Opinion by Bigolow, J.	92
Massachusetts, law of 1850, regulating the time and manner of taking fish in the sea within its territorial limits.	Dunham vs. Lamphere, 3 Gray, 268, (1855.) Opinion by Shaw, C. J.	94
Alabama, statute of 1854, imposing a penalty for not registering in the proper office the names and owners of steamboats.	Commissioners of Pilotage vs. Steamboat Cuba et al., 23 Ala., 185, (1856.) Opinion by Goldthwaite, C. J.	98
Louisiana, statute of 1855, requiring port wardens to perform certain duties in regard to vessels, for which they were to receive certain fees.	Port Wardens vs. Ship M. J. Ward, 14 La. An. Rep., 289, (1859.) Opinion by Cole, J.	101
Pennsylvania, statute imposing a toll or duty upon all tonnage of whatsoever kind or description, except the ordinary baggage of passengers carried over a railroad.	Pennsylvania Railroad Company vs. the Commonwealth, 3 Grant's Cases, 128, (1860.) Opinion by Lowrie, C. J.	103
Massachusetts, statute of 1862, imposing a tax on a savings bank on the amount of its deposits.	Commonwealth vs. the People's Five Cents Savings Bank, 5 Allen, 428, (1862.) Opinion by Bigelow, C. J.	105
New Jersey, statute of March 28, 1862, laying a tax on the business of a foreign corporation doing business in the State, graduated by the number of passengers and weight of goods carried.	New Jersey vs. the Delaware, Lackawanna and Western Railroad Company, 1 Vroom, 473, (1864.) Opinion by Haines, J.	107
New Jersey, statute authorizing bridges to be built over rivers wholly within its jurisdiction.	The Passaic Bridges, 3 Wallace, 782, (1865.) Opinion by Grier, J.	110
Massachusetts, statute of 1862, imposing a tax upon the deposits of a saving institution, a portion whereof were invested in Federal securities.	Provident Institution vs. Massachusetts, 6 Wallace, 611, (1867.) Opinion by Clifford, J. Chase, C. J., Grier, J., and Miller, J., dissented.	112
Connecticut, statute of 1863, imposing an annual tax on savings banks equal to three-fourths of one per cent. on the total amount of their deposits on a given day.	Society for Savings vs. Coite, 6 Wallace, 594, (1867.) Opinion by Clifford J. Chase, C. J., Grier, J., and Miller, J., dissented.	114
Oregon, statute declaring that taxes must be paid in gold and silver coin.	Lane County vs. Oregon, 7 Wallace, 71, (1868.) Opinion by Chase, C. J.	116
Virginia, statute of 1867, restricting appeals to the Supreme Court of the State to cases in which the sum in controversy exceeds $1,000.	Downham vs. Alexandria, 9 Wallace, 659, (1869.) Opinion by Chase, C. J.	119
Pennsylvania, statute of 1866, regulating the floating of logs on a navigable stream.	Craig vs. Kline, 15 P. F. Smith, 399, (1870.) Opinion by Agnew, J.	120
Virginia, statute of May 3, 1866, imposing a tax on every ton of oysters taken from her waters.	Johnson vs. Drummond, 20 Grattan, 419. (1871.) Opinion by Mancure, J.	124

ANALYSIS

OF

Cases Cited by Plaintiffs in Error.

GIBBONS vs. OGDEN, 9 Wheaton, 1, (1824.)

A State law granting to certain persons the exclusive right of navigation is unconstitutional.

(Counsel.) Mr. WEBSTER for GIBBONS.

Mr. OAKLEY and Mr. EMMETTS for OGDEN.

(Statutes reviewed.) The acts under review were laws passed by New York, granting to Livingston & Fulton, for a term of years, the exclusive right to navigate all the waters within the jurisdiction of that State with boats moved by fire or steam.

(History.) Gibbons was in the possession of two steamboats, employed in running between New York and Elizabethtown, in violation of the exclusive privilege claimed by Ogden, who held an assignment from Livingston.

An injunction was awarded to restrain Gibbons from using the said boats in navigating the waters within the territory of New York.

This, he contended, was in conflict with the Constitution of the United States and the act of Congress, entitled "An Act for enrolling and licensing ships and vessels to be employed in the coasting trade and fisheries, and for regulating the same."

The court for the trial of impeachments and correction of errors, in New York, decided that the acts were not repugnant to the Constitution and laws of the United States.

The opinion of the Supreme Court of the United States was delivered by

MR. CHIEF JUSTICE MARSHALL.

He refers to the clause of the Constitution that Congress shall have power to regulate commerce, &c., and says this also extends to the regulation of navigation.

He holds that the power vested in Congress to regulate commerce extends to every species of commercial intercourse between the United States and foreign nations, and among the several States, and that it does not stop at the external boundary of the State, but may be introduced into the interior.

On this subject the Chief Justice says, (p. 194:)

"It is not intended to say that these words comprehend that "commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of "the same State, and which does not extend to or affect other "States. Such a power would be inconvenient, and is certainly "unnecessary."

"Comprehensive as the word 'among' is, it may very properly "be restricted to that commerce which concerns more States than "one. The phrase is not one which would probably have been "selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power "was to be extended would not have been made had the intention "been to extend the power to every description.

"The enumeration presupposes something not enumerated, and "that something, if we regard the language or the subject of the "sentence, must be the exclusively internal commerce of a State. "The genius and character of the whole government seem to be "that its action is to be applied to all the external concerns of "the nation, and to those internal concerns which affect the States "generally, but not to those which are completely within a particular State, which do not affect other States, and with which "it is not necessary to interfere for the purpose of executing some "of the general powers of the government. *The completely internal commerce of a State, then, may be considered as reserved for the "State itself.*"

The court go on to say that "in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States," (p. 195.)

But after establishing that the power extends to "navigation within the limits of every State in the Union," the limitation is added, "*so far as that navigation may be in any manner connected "with commerce with foreign nations, or among the several States or "with the Indian tribes.*" (p. 197.)

The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the States * * (p. 198) * * to tax for the support of their own governments. Nor is the exercise of that power by the States an exercise of any portion of the power that is granted to the United States, (p. 199.) * * *

Congress is not empowered to tax for those purposes which are within the exclusive province of the States, (p. 199.)

State inspection laws and laws *for regulating internal commerce of a State*, &c., are not within the power granted to Congress, and they remain subject to State legislation, (p. 203.)

It was further ruled, that a license under the act of Congress for regulating the coasting trade gives a permission to carry on that trade, and to transport passengers in all the navigable streams.

That this law of New York is in collision with the acts of Congress regulating the coasting trade, and is therefore unconstitutional, even though enacted in pursuance of powers acknowledged to remain in the States.

For these reasons the decree of the court of New York for the trial of impeachments and the correction of errors was reversed and annulled.

MR. JUSTICE **JOHNSON** dissented.

CORFIELD vs. CORYELL, 4 Washington, C. C. R., 379, (1824.)

1. *An act limiting the right of raking oysters to the inhabitants of the State is constitutional.*

2. *State legislation may be constitutional although it indirectly affects commerce.*

This case, and the reasoning of Judge Washington, support the right of a State to regulate its own internal commerce.

(Counsel.) Messrs. C. J. and J. R. INGERSOLL for CORFIELD.
Messrs. M'ILVAINE and CONDY for CORYELL.

(Statute reviewed.) The act under review was a New Jersey statute, passed on the 9th day of June, 1820. By the sixth section thereof it was enacted that it should "not be lawful for any person who was "not, at the time, an actual inhabitant and resident of the State, "to rake or gather clams, oysters or shells in any of the rivers, "bays or waters in the State, on board of any canoe, flat, scow, "boat or other vessel, not wholly owned by some person an inhabitant of and actually residing in the State; and every person "offending therein should forfeit and pay $10.00, and should also "forfeit the canoe, flat, &c., employed in the commission of the "offence, together with all the clams, oysters, rakes, tongs, tackle, "&c., belonging to the same."

(History.) Corfield was the owner of a vessel which he hired to Hand, who in turn hired her to Keene; Keene left Philadelphia for the oyster beds in Maurice River Cove, N. J. While engaged in collecting oysters, contrary to the provisions of the act, the vessel was seized by the authorities, and, after an examination, condemned and sold. The owner then brought trespass for seizing and selling his vessel.

It was contended that the statute was unconstitutional. The Circuit Court decided that the law was not repugnant to any of the provisions of the Constitution of the United States.

WASHINGTON, J., *delivered the opinion of the court:*

" The first question then is whether this act is repugnant to the " power granted to Congress to regulate commerce. Commerce " with foreign nations, and among the several States, can mean " nothing more than intercourse with those nations, and among " those States, for purposes of trade, be the object of trade what " it may; and this intercourse must include all the means by which " it can be carried on, whether by the free navigation of the waters " of the several States, or by a passage over land, through the " States, where such passage becomes necessary to the commer- " cial intercourse between the States. It is this intercourse which " Congress is invested with the power of regulating, and with which " no State has the right to interfere. But this power which com- " prehends the use of and passage over the navigable waters of " the several States, does by no means impair the right of the " State governments to legislate upon all subjects of internal " police within their territorial limits, which is not forbidden by " the Constitution of the United States, even although such leg- " islation may indirectly and remotely affect commerce, provided " it do not interfere with the regulations of Congress upon the " same subject. Such are inspection, quarantine and health laws; " laws regulating the internal commerce of the State; laws es- " tablishing and regulating turnpike roads, ferries, canals and the " like. (p. 378–9.)

The judge then refers to Gibbons *vs* Ogden, (9 Wheat., 1,) and quotes from that decision, "no direct power over these objects" (to regulate the internal commerce of a State) "is granted to Congress and consequently they remain subject to State legislation." He then shows that the State has the right to legislate, in such manner as in their wisdom may seem best, over the public property of the State, and to regulate the use of the same, when such regulation does not interfere with the free navigation of the waters of the State.

Congress has the power to regulate commerce on the navigable waters of a State, but the grant of this power is no cession, either express or implied of territory, or of public or private property.

All fisheries remain common to all the citizens of the State to which they belong, to be used according to the laws which regulate their use.

By the statute in question the free use of the waters of the State for purposes of navigation and commercial navigation or intercourse is interdicted to no person, nor is any restraint imposed on any one to buy, or sell, or to trade within the limits of the State.

The exclusive right of taking oysters in the waters of New Jersey has never been ceded by the State, in express terms, to the United States, and this right is a right of property, vested either in certain individuals or in the State, for the use of the citizens thereof.

For the reasons above stated, it was held that the act was not repugnant to any of the provisions of the Constitution of the United States, and judgment was entered for the defendant.

BROWN, et al., vs. THE STATE OF MARYLAND, 12 Wheaton, 419, (1827.)

A State law requiring an importer of foreign goods to take out a license before selling is unconstitutional.

(Counsel.) Mr. MEREDITH and the ATTORNEY GENERAL for PLAINTIFFS IN ERROR.

Messrs. TANEY and JOHNSON for DEFENDANT.

(Statute reviewed.) The act under review was a law passed in 1821 by Maryland, which provided that all "IMPORTERS of foreign articles, "or commodities, of dry goods, wares or merchandise, by bale or "package, or of wine, rum, brandy, &c., and other persons selling "the same by wholesale, bale or package, hogshead, barrel or tierce, "shall before they are authorized to sell, take out a license, for "which they shall pay fifty dollars, &c."

(History.) It was contended that this law was in conflict with the Constitution of the United States, which prohibits the State, without the consent of Congress, from laying any impost or duties on imports or exports.

Judgment was entered against the defendants by the city court of Baltimore, which was affirmed by the court of appeals.

The opinion of the Supreme Court was delivered by

MR. CHIEF JUSTICE MARSHALL.

"The cause depends entirely on the question whether the Legislature of a State can constitutionally require the importer of "foreign articles to take out a license from the State before he "shall be permitted to sell a bale or package so imported."

"It has been truly said that the presumption is in favor of every "legislative act, and that the whole burthen of proof lies on him "who denies its constitutionality." (p. 436.)

* * * * "An impost or duty on imports is a custom or a "tax levied on articles brought into a country, and is most usually "secured before the importer is allowed to exercise his rights of "ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in "his custody. It would not, however, be less an impost or duty "on the articles if it were to be levied on them after they were "landed." (p. 437.)

* * * "From motives which were deemed sufficient by the "statesmen of that day, the general power of taxation, indispensably necessary as it was, and jealous as the States were of any "encroachment on it, was so far abridged as to forbid them to "touch imports or exports, with the single exception which has "been noticed. Why are they restrained from imposing these "duties? Plainly, because, in the general opinion the interest of "all would be best promoted by placing that whole subject under "the control of Congress." (p. 439.)

* * * "There is no difference, in effect, between a power to "prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary conse-

"quence of the other. No goods would be imported if none could "be sold. No object of any description can be accomplished by "laying a duty on importation, which may not be accomplished "with equal certainty by laying a duty on the thing imported in "the hands of the importer. It is obvious that the same power "which imposes a light duty can impose a heavy one, one which "amounts to a prohibition." (p. 439.)

* * * "If the tax may be levied in this form by a State, it "may be levied to an extent which will defeat the revenue by impost, so far as it is drawn from importations into the particular "State." (p. 439.)

* * * "A duty on imports is a tax on the article which is "paid by the consumer. The great importing States would thus "levy a tax on the non-importing, which would not be less a tax "because their interest would afford ample security against its "ever being so heavy as to expel commerce from their ports. This "would necessarily produce countervailing measures on the part "of those States whose situation was less favorable to importation. "For this, among other reasons, the whole power of laying duties "on imports was, with a single and slight exception, taken from "the States. When we are inquiring whether a particular act is "within this prohibition, the question is not whether the State "may so legislate as to hurt itself, but whether the act is within "the words and mischief of the prohibitory clause." (p. 440.)

* * * "It may be conceded that the words of the prohibition "ought not to be pressed to their utmost extent; that in our complex system the object of the powers conferred on the government "of the Union, and the nature of the often conflicting powers which "remain in the States, must always be taken into view, and may "aid in expounding the words of any particular clause. But, while "we admit that sound principles of construction ought to restrain "all courts from carrying the words of the prohibition beyond the "object the Constitution is intended to secure, that there must "be a point of time when the prohibition ceases, and the power "of the State to tax commences, we cannot admit that this point "of time is the instant that the articles enter the country. It is, "we think, obvious that this construction would defeat the prohibition." (p. 441.)

* * * "It is sufficient for the present to say, generally, that
"when the importer has so acted upon the thing imported that it
"has become incorporated and mixed up with the mass of property
"in the country, it has perhaps lost its distinctive character as an
"import, and has become subject to the taxing power of the State;
"but while remaining the property of the importer, in his ware-
"house, in the original form or package in which it was imported,
"a tax upon it is too plainly a duty on imports to escape the pro-
"hibition in the Constitution." (p. 441-2.)

Mr. Justice THOMPSON dissented.

He said: "It is very obvious that this law can in no manner
"whatever affect the commercial intercourse between the States;
"it applies purely to the internal trade of the State of Maryland.
"The defendants were merchants, trading in the city of Baltimore.
"The indictment describes them as such, and alleges the sale to
"have been in that place, and nothing appears to warrant an in-
"ference that the package of goods sold was not intended for
"consumption at that place; and the law has no relation what-
"ever to goods intended for transportation to another State."
(p. 451.)

* * * "Neither the act, nor the form in which the complaint
"is presented, makes any discrimination between the importer
"and any other wholesale dealer in foreign merchandise, but re-
"quires both to take out a license to sell. Nor does it appear to
"me that this law in any manner infringes or conflicts with the
"power of Congress to regulate commerce with foreign nations.
"It is to be borne in mind that this was a power possessed by the
"States, respectively, before the adoption of the Constitution, and
"is not a power growing out of the establishment of the general
"government. It is to be viewed, therefore, as the surrender of
"a power antecedently possessed by the States, and the extent of
"the surrender must receive a fair and reasonable interpretation
"with reference to the object for which the surrender was made.
"This was principally with a view to the revenue, and extended
"only to the external commerce of the United States, and did not
"embrace any portion of the internal trade or commerce of the
"several States. This is not only the plain and obvious interpre-
"tation of the terms used in the Constitution, *commerce with for-*

"*eign nations*, but such has been the construction adopted by this "court. In the case of *Gibbons vs. Ogden*, (9 Wheaton, 194,) the "court, in speaking of the grant of power of Congress to regulate "commerce, say: 'It is not intended to comprehend that com-"merce which is completely internal, which is carried on between "man and man in a State, or between different parts of the same "State, and which does not extend to or affect other States. Such "a power would be inconvenient, and is certainly unnecessary. "The enumeration of the particular classes of commerce to which "the power was to be extended would not have been made had "the intention been to extend the power to every description. "The enumeration pre-supposes something not enumerated, and "that something, if we regard the language on the subject of the "sentence, must be the exclusively internal commerce of a State.'" (p. 452.)

* * * "It is laid down in No. 32 of the *Federalist*, (and I "believe universally admitted,) 'that the States, with the sole "exception of duties on imports and exports, retain authority to "tax in the most absolute and unqualified sense, and any attempt "on the part of the national government to abridge them in the "exercise of it would be a violent assumption of power, unwar-"ranted by any article or clause in the Constitution.'" (p. 456.)

WILSON vs. BLACKBIRD CREEK Co., 2 Peters, 245, (1829.)

1. *An Act authorizing the building of a dam across a navigable creek is constitutional.*
2. *Such an act is not repugnant to the Constitution, Congress not having exercised its power of regulating commerce over the stream.*

(Counsel.) Mr. COXE for WILSON.
Mr. WIRT for BLACKBIRD CREEK CO.

(Statute reviewed.) By an act of the General Assembly of Delaware, passed in 1822, the Blackbird Creek Marsh Company was incorporated, and the owners and possessors of the marsh, low grounds, &c., in New Castle county, Delaware, lying on both sides of Blackbird creek and extending to the river Delaware, were authorized and empowered to build a dam across said creek, at such place as a majority of them should find to be most suitable, &c.

(History.) Wilson and others were the owners of a sloop regularly licensed and enrolled according to the navigation laws of the United States. The vessel broke and injured the dam. An action of trespass was instituted against them in the Supreme Court of the State of Delaware, in which damages were claimed amounting to $20,000.

It was contended by the defendants that the creek was a public and navigable stream for all the citizens of the State of Delaware and of the United States to sail, pass and re-pass into, over, through, in and upon the same with sloops or other vessels at all times of the year, at their own free will and pleasure.

The Supreme Court of the State gave judgment against the defendants, and the judgment was affirmed by the Court of Errors and Appeals.

The opinion of the Supreme Court of the United States was delivered by

CHIEF JUSTICE MARSHALL.

After referring to the jurisdiction of the court, and to the act authorizing the building of the dam, he says: "The measure "authorized by this act stops a navigable creek and must be sup-"posed to abridge the right of those who have been accustomed to "use it. But this abridgment, unless it comes in conflict with "the Constitution or a law of the United States, is an affair be-"tween the government of Delaware and its citizens, of which "this court can take no cognizance.

"The counsel for plaintiffs in error insist that it comes in con-"flict with the power of the United States 'to regulate commerce "with foreign nations and among the several States.' If Congress "had passed any act in execution of the power to regulate com-"merce, the object of which was to control State legislation over "those small navigable creeks into which the tide flows, * * "we should not feel much difficulty in saying that a State law coming in conflict with such act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its own repugnancy to the power to regulate commerce with foreign nations and among the several States, a power which has not been so exercised as to affect this question."

The judgment was affirmed.

CITY OF NEW YORK vs. MILN, 11 Peters, 102, (1837.)

1. *A State act is constitutional which requires the captain of every vessel arriving from a foreign port to report a list of all passengers.*
2. *The internal commerce of a State is reserved to itself.*
3. *Until Congress exerts its power to regulate commerce, the States may pass acts partaking of the character of commercial regulations.—Gibbons vs. Ogden,* 9 *Wheaton,* 1; *Brown vs. Maryland,* 12 *Wheaton,* 419, *reviewed.*

(Counsel.) Messrs. BLOUNT and OGDEN for the CITY.
Messrs. WHITE and JONES for MILN.

(Statute reviewed.) The act under review was a law passed in February, 1824, by the Legislature of New York, which enacted that every master or commander of any ship or other vessel arriving at the port of New York from any country out of the United States, or from any other of the United States than the State of New York, shall, within twenty-four hours after the arrival of such ship or vessel in said port, make a report in writing, under oath or affirmation, to the mayor, of every person brought as a passenger in such ship or vessel from any country out of the United States into the port of New York, &c., and of all passengers who shall have landed or been permitted to land from such ship or vessel, or suffered to go on board any other ship or vessel with the intention of proceeding to said city, under the penalty on such master or commander, and the owner or owners, consignee or consignees of such ship or vessel of seventy-five dollars for every person neglected to be reported as aforesaid, &c.

(History.) Miln was the consignee of a ship which arrived in the port of New York from some country out of the United States. One hundred passengers were brought into the port on this vessel, and the master did not make the report required by the statute.

An action of debt was brought against him for the recovery of $15,000, the amount of certain penalties incurred under the provisions of said act.

He demurred, and argued that the act imposing the penalties was in conflict with that part of the Constitution of the United States which declares that Congress shall have power to regulate commerce, &c.

The Circuit Court of the United States was divided in opinion on this question.

The opinion of the Supreme Court of the United States was delivered by

Mr. Justice BARBOUR.

The question involved in this case is whether the act assumes to regulate trade and commerce between the port of New York and foreign ports, and is therefore unconstitutional and void.

"On the part of the plaintiff it is argued that an affirmative "grant of power previously existing in the States to Congress is "not exclusive, except, 1st. Where it is so expressly declared in "terms by the clause giving the power. 2d. Where a similar power "is prohibited to the States. 3d. Where the power in the States "would be repugnant to and incompatible with a similar power "in Congress." (p. 131.)

The learned judge says we shall not enter into the examination of the question whether the power to regulate commerce be or be not exclusive of the States, as the court "are of the opinion that "this act is not a regulation of commerce, but of police," and that being thus considered, it was passed in the exercise of a power which rightfully belonged to the States. (p. 132.)

He refers to Vattel, book 2d, chap. 7th, sec. 94: "The sovereign may forbid the entrance of his territory either to foreigners in general or in particular cases, or to certain persons or for certain particular purposes, according as he may think it advantageous to the State." Ibid., ch. 8, sec. 100. "Since the lord of the territory may, whenever he thinks proper, forbid its being entered, he has no doubt a power to annex what condition he pleases to the permission to enter."

He says: "The power to pass this law having existed undeniably in New York 'at the formation of the Constitution, the "simple inquiry is whether by that instrument it was taken "from the States and granted to Congress, *for if it were not, it yet "remains with them;'* and if, as we think, it be a regulation of "police, and not of commerce, then it is not taken away from the "States." (132.)

He refers to the Federalist, in the 45th number, which says: "The "powers reserved to the several States 'will extend to all objects "which, in the ordinary course of affairs, concern the lives, liber-"ties and properties of the people, and the internal order, im-"provement and property of the State.'" (p. 133.)

He refers to Gibbons *vs.* Ogden, 9 Wheat., 203, where, in speaking of the inspection laws of the States, it is said: "They form a "portion of that immense mass of legislation which embraces "everything within the territory of the State not surrendered to "the general government, all of which can be most advantageously "exercised by the States themselves." (p. 133.)

He refers to Gibbons *vs.* Ogden, 9 Wheat., p. 1, and Brown *vs.* The State of Maryland, 12 Wheat., 419, and says, "that the point "involved in this case is not the point decided in either of the "cases."

In the first case the court decided, "that the power to regulate "commerce embraced within its scope the regulation of naviga-"tion, and that the power over navigation extended to all the "navigable waters in the United States."

He says: "The facts of that case and of this are in striking "contrast. In the one the law operated on navigable waters, "and in this it is over the territory of New York, over which that "State possesses an acknowledged and undisputed jurisdiction "for every purpose of internal regulation." (p. 135.)

Referring to Brown *vs.* Maryland, he says: "That it is difficult "to perceive what analogy there can be between a case where the "right of the State was inquired into in relation to a tax imposed "upon the sale of imported goods, and one where, as in this case, "the inquiry is as to its right over persons within its acknowledged "jurisdiction." (p. 136.)

He says, (p. 139,) that "A State has the same *undeniable and "unlimited jurisdiction over all persons and things within its terri-"torial limits as any foreign nation, where that jurisdiction is not* "*surrendered or restrained by the Constitution of the United States.*" (p. 139.)

* * * He says: "That all those powers which relate to merely "municipal legislation, or what may perhaps more properly be "called internal police, are not thus surrendered or restrained, "and that, consequently, in relation to these, the authority of the "State is complete, unqualified and exclusive." (p. 139.)

He adds: "We should say that every law came within this jurisdiction which concerned the welfare of the whole people of a "State, or any individual within it, whether it related to their "rights or their duties, whether it respected them as men or as "citizens of the State, whether it related to the rights of persons "or of property of the whole people of a State, or of any individual "in it, and whose operation was within the territorial limits of the "State, and upon the persons and things within its jurisdiction." (p. 139.)

For these reasons we are of the opinion that so much of the law as is alleged to regulate commerce does not do so.

MR. JUSTICE THOMPSON delivered a concurring opinion.

He says: "In the leading cases upon this question, where the "State law was held to be unconstitutional, *there was an actual "conflict between the legislation of Congress and that of the States "upon the right drawn in question; that in the case now before the "court no conflict arises, as Congress has not legislated on this subject in any manner to affect the question.*" (p. 145 and 146.)

He refers to Gibbons *vs.* Ogden, 9 Wheat., 195, where it is said: "The genius and character of the whole government seems to be "that its action is to be applied to all external concerns of the "nation, and to those internal concerns which affect the States generally, but not to those which are completely within a particular State and which do not affect other States. *The completely "internal commerce of a State may, then, be considered as reserved for "the State itself.*" (p. 146.)

He refers to Wilson *vs.* Blackbird Creek Marsh Company, 2 Peters, 251.

He says: "*This is a strong case to show that a power admitted to fall within the power to regulate commerce may be exercised by the States until Congress assumes its exercise.*" (p. 149.)

He says: "*It becomes, therefore, a very important principle to establish, that the States retain the exercise of powers, although they may in some measure partake of the character of commercial regulations, until Congress asserts the exercise of the power under the grant of the power to 'regulate commerce.*" (p. 149 and 150.)

MR. JUSTICE STORY dissented, on the ground that it was an act to regulate trade and commerce.

DOBBINS vs. THE COMMISSIONERS OF ERIE COUNTY,

16 Peters, 435, (1842.)

1. *A State cannot tax the salary of an officer of the United States.*
2. *State legislation may attach to all persons and property within its jurisdiction, with the limitation that the States cannot collect a revenue out of the revenues of the United States.*

(Counsel.) Mr. GALBRAITH for PLAINTIFF IN ERROR.
Mr. PENROSE for DEFENDANTS.

(History.) The question presented in this case was whether the office of captain of a revenue cutter of the United States was liable to be assessed for taxes under the laws of Pennsylvania.

Dobbins had been for eight years a captain in the United States revenue cutter service at the Erie station. He had been rated and assessed with county taxes for the years 1835, 1836 and 1837, which taxes so rated and assessed and paid amounted to the sum of ten dollars and seventy-five cents. He sued to recover this sum.

The Court of Common Pleas gave judgment for the plaintiff, Dobbins, which judgment was reversed by the Supreme Court of the State, and judgment entered for the commissioners.

The opinion of the Supreme Court of the United States was delivered by

Mr. JUSTICE WAYNE.

He says: "The question is whether the plaintiff is liable to be "rated and assessed for his office under the United States for "county rates and levies." (p. 444.)

"Taxation is a sacred right, essential to the existence of government; an incident of sovereignty. The right of legislation is "co-extensive with the incident to *attach it upon all persons and* "*property within the jurisdiction of the State.* But in our system "there are limitations upon that right. There is a concurrent "right of legislation in the States and the United States, except "as both are restrained by the Constitution of the United States." (p. 447.) * * *

"This occurs when taxation by a State acts upon the instruments, emoluments and persons which the United States may "use and employ as necessary and proper means to execute their "sovereign powers." * * *

He refers to M'Culloch *vs.* State of Maryland, 4 Wheat., 316, and Weston *vs.* City Council of Charleston, 2 Peters, 449. In both of these cases it was decided that the State government cannot levy a tax upon the constitutional means employed by the government of the Union to execute its constitutional powers.

For these reasons he decides that the act conflicts with a law of Congress, made in pursuance of the Constitution, and that the judgment of the Supreme Court ought to be reversed.

SMITH vs. TURNER, 7 Howard, 283, (1849.)

A State law imposing a tax upon alien passengers arriving in port is unconstitutional.

(Counsel.) Messrs. WEBSTER and OGDEN for SMITH.
Messrs. HALL and VAN BUREN for TURNER.

NORRIS vs. THE CITY OF BOSTON, 7 Howard, 464.

(Counsel.) Messrs. WEBSTER, CHOATE and Mr. J. PRESCOTT HALL for NORRIS.
Messrs. DAVIS and ASHMUN for CITY OF BOSTON.

(Statute reviewed.) The same question being involved in the above cases, they were both considered at the same time.

In the first case the question arose under an act passed by New York, in which it was provided that the health commissioner should demand and be entitled to receive, and in case of neglect or refusal to pay, should sue for and recover from the master of every vessel from a foreign port, and each cabin passenger, one dollar and fifty cents; for each steerage passenger, mate, sailor or mariner, one dollar, and from the master of each coasting vessel, for each person on board, twenty-five cents.

(History.) Smith was the master of a British vessel which touched at the port of New York, and landed two hundred and ninety steerage passengers.

An action of debt was brought against him to recover one dollar for each of the above passengers.

He demurred and assigned for cause of demurrer that the statute was in conflict with the Constitution of the United States.

The Supreme court of the State over-ruled this demurrer, and the Court of Errors affirmed the judgment.

(Statute reviewed.) In the case of Norris *vs.* the City of Boston, the act under review was a law passed in 1837 by Massachusetts, which enacted, among other things, that no alien passenger should be permitted to land at any port or harbor of that State, until the master, owner, consignee or agent of the vessel should pay two dollars to the boarding officer for every passenger so landed.

(History.) Norris was the master of a British vessel which arrived in the port of Boston, having on board nineteen alien passengers. Before landing them he paid to the city of Boston two dollars for each of the passengers landed.

He brought suit against the city to recover this sum, claiming that the act was an impost or duty on imports, and therefore unconstitutional.

The Supreme Judicial Court of the State decided that the act was not unconstitutional.

The Supreme Court of the United States reversed these judgments, M'Lean, J., Wayne, J., Catron, J., Grier, J., and M'Kinley, J., uniting in the order; Taney, C. J., Daniel, J., Nelson, J., Woodbury, J., dissenting.

MR. JUSTICE M'LEAN.

The questions involved are—

I. Is the power of Congress to regulate commerce exclusive?

II. Are the statutes in question regulations of commerce?

The learned judge refers to previous decisions, and quotes from 3d Madison papers, 1585, 1586, the debate on the motion that "no "State should lay any duty on tonnage without the consent of "Congress."

He says: "It does not follow, as is often said, that when a "State law shall conflict with an act of Congress, the former must "yield. On the contrary, except in certain cases named in the "Federal Constitution, this is never correct, when the act of the "State is strictly within its powers." (p. 397.) "No one doubts "the power of a State to regulate its internal commerce."

He says: "State powers are at all times and under all circum- "stances exercised independently of the general government, and "are never declared void or inoperative except when they tran-

"scend State jurisdiction. And on the same principles the Federal "authority is void when exercised beyond its constitutional limits." (p. 399.) * * *

"All commercial action within the limits of a State, and which "does not extend to any other State or foreign country, is exclusively under State regulation." (p. 400.)

"A State cannot regulate foreign commerce, but it may do "many things which more or less affect it. It may tax a ship or "other vessel used in commerce the same as other property owned "by its citizens. A State may tax the stages in which the mail "is transported, but this does not regulate the conveyance of the "mail any more than taxing a ship regulates commerce, and yet "in both instances the tax on the property in some degree affects "its use."

He quotes from New York City *vs.* Miln, 11 Peters, 102:

"In their opinion this court say: The law operated on the territory of New York, over which the State possesses an acknowledged and undisputed jurisdiction for every purpose of internal "regulation."

Mr. Justice WAYNE

Agreed with Mr. Justice M'Lean, Mr. Justice Catron, Mr. Justice M'Kinley and Mr. Justice Grier, that the laws of Massachusetts and New York, so far as they are in question in these cases, are unconstitutional and void.

He says: "In the first place, let it be understood that in whatever I may say upon the power which Congress has 'to regulate "commerce with foreign nations and among the several States, "and with the Indian tribes,' *the internal trade of a State is not "meant to be included, that not being in any way within the regulating power of Congress.*" (p. 415.) * * *

"Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a "State, and those which respect turnpike roads, ferries, &c., are "component parts of that immense mass of legislation which embraces everything within the territory of a State not surrendered "to the general government." (p. 417.)

He refers to the police powers of a State, and says: "How "much of them have the States retained? I answer unhesita-

"tingly, all necessary to their internal government. Generally, "all not delegated by them, in the articles of confederation, to "the United States of America, all not yielded by them under "the Constitution of the United States." (p. 424.) * * *

"In my opinion the case of Gibbons *vs.* Ogden rules the cases "before us. If there were no other reasons, with such an authority to direct my course, I could not refrain from saying that "the acts of Massachusetts and New York, so far as they are in "question, are unconstitutional and void." (p. 437.)

MR. JUSTICE **CATRON** said:

"*It is also insisted that the States may tax all persons and property "within their respective jurisdictions, except in cases where they are "affirmatively prohibited.* THIS IS A TRUISM NOT OPEN TO DENIAL. CERTAINLY THE STATES MAY TAX THEIR OWN INHABITANTS AT DISCRETION, UNLESS THEY HAVE SURRENDERED THE "POWER." (p. 452)

MR. JUSTICE **M'KINLEY**

Referred to Brown *vs.* Maryland, 12 Wheat, 419, "in which "the court carried out the power of Congress to regulate commerce with foreign nations, upon the subject then under consideration, to the line which separates it from the reserved powers "of the States, and plainly established the power of the States "over the same subject matter beyond that line. (p. 455.)

MR. JUSTICE **GRIER** said:

"It is admitted by all, that those powers which relate to merely "municipal legislation, or what may be more properly called internal police, are not surrendered or restrained." (p. 457.)

For the reasons stated, the court were of the opinion that the acts were unconstitutional and void.

MR. CHIEF JUSTICE **TANEY** dissented.

He said these laws are a part of the pauper laws of the State.

He referred to the thirty-second number of the Federalist: "That notwithstanding the affirmative grants of general authorities, there has been the most pointed care, in those cases where "it was deemed improper that the like authorities should reside "in the States, to insert negative clauses prohibiting the exercise "of them by the States. The grant of a general authority to "regulate commerce is not, therefore, a prohibition to the States "to make any regulations concerning it within their own territo- "rial limits, not in conflict with the regulations of Congress." (p. 471.)

He says: "It has always been held that the power to regulate "commerce does not give to Congress the power to tax it, nor "prohibit the States from taxing it in their own ports and within "their own jurisdiction." (p. 479.)

He refers to Federalist 32, and says: "It maintains that no "right of taxation which the States had previously enjoyed was "surrendered unless expressly prohibited." (p. 479.)

"The grant of the power to regulate commerce did not, ~~in~~ the "opinion of Mr. Hamilton, Mr. Madison and Mr. Jay, prohibit "the States from laying imposts and duties upon imports brought "into their own territories. It did not apply to the right of taxa- "tion in either sovereignty, the taxing power being a distinct and "separate power from the regulation of commerce." (p. 480.) * *

"I may therefore safely assume that, according to the true con- "struction of the Constitution, the power granted to Congress to "regulate commerce did not in any degree abridge the power of "taxation in the States." (p. 480.) * * *

"They are expressly prohibited from laying any duty on imports "or exports, except what may be absolutely necessary for execut- "ing their inspection laws, and also from laying any tonnage "duty. So far their taxing power over commerce is restrained, "but no farther. They retain all the rest, and if the money de- "manded is a tax upon commerce, or the instrument or vehicle of "commerce, it furnishes no objection to it unless it is a duty on "imports or a tonnage duty, for these alone are forbidden." (p. 480.)

Mr. JUSTICE DANIEL dissented.

He said: "The proposition I maintain is this: That regulations "of commerce do not embrace taxes on any or on all the subjects "above named, exacted within the just sphere of the power im- "posing them. Thus, then, the assessment made by New York "is purely a tax, not a regulation of commerce." (p. 503.)

He refers to Federalist, 32. The writer, Alexander Hamilton thus expresses himself. "I am willing here to allow, in its full "extent, the justness of the reasoning which requires that the individual States should possess an independent and uncontrollable "authority to raise their own revenues for the supply of their own "wants. And making this confession I affirm (with the exception "of duties on imports and exports) they would, under the plan of "the convention, retain that authority in the most absolute and "unqualified sense." (p. 504.)

Mr. JUSTICE NELSON dissented.

He concurred in the opinions just stated.

Mr. JUSTICE WOODBURY, dissenting, said:

"The power of taxation, generally, in all independent States, is "unlimited as to persons and things, except as they may have "been pleased, by contract or otherwise, to restrict themselves. "Such a power likewise is one of the most indispensable to their "welfare and even their existence." (p. 531.) * *

"I would remark, that the very prohibition to the States, in ex-"press terms, to tax imports, furnishes additional proof that other "taxation by the States was not meant to be forbidden in other "cases and as to other matters." (p 533.) * *

"It has been conceded by most American jurists, and indeed "may be regarded as settled by this court, that this concurrent "power of taxation, except on imports and exports and tonnage, "(the last two specially and exclusively resigned to the general "government,) is vital to the States and still clearly exists in "them." * *

"In point of fact, it is well known that the general jurisdiction "of the States, for most municipal purposes within their territo-"ries, including taxation, has never been ceded to the United "States nor claimed by them." (p. 539.)

"Laws by States for local purposes, and to operate only within "State limits, are not usually intended and should not be consid-"ered as laws 'to regulate commerce.'" (p. 546.)

He refers to opinion of Chief Justice Marshall, in 9 Wheat., p. 204, and says: "That Congress for one purpose and a State for "another may use like means and both be vindicated. And though "Congress obtains its power from a special grant, like that of the "power 'to regulate commerce,' the State may obtain it from a reserved power over internal commerce or over its police."

"In short, it has been deliberately held by this court that the laying a duty on imports, if this was of that character, is an exercise of the taxing power, and not of that to regulate commerce." (p. 554.)

For the reasons stated they were of the opinion that the judgments of the courts below should be affirmed.

PENNSYLVANIA vs. THE WHEELING BRIDGE CO.,

9 Howard 647, 11 Howard, 523, 13 Howard, 518, 18 Howard, 421, (1849-1855.)

A State law authorizing the building of a bridge over a navigable stream, as to which Congress has exercised its power to regulate commerce, is unconstitutional.

(Counsel.) For PENNSYLVANIA, Messrs. C. DARRAGH, SHALER, STANTON and ROBERT J. WALKER.
For BRIDGE CO., Messrs. ALEX. H. H. STEWART and REVERDY JOHNSON.

(History.) The General Assembly of Virginia authorized the construction of a bridge across the Ohio, one hundred miles below Pittsburg, across the channel of the Ohio river, between Zane's island and the main Virginia shore at Wheeling.

August 16, 1849, the State of Pennsylvania moved for an injunction before Mr. Justice Grier, at Philadelphia.

In the report in 9 Howard, 647–8, an analysis of the bill is given, in which it was charged that the bridge would so obstruct the navigation of the Ohio river as to cut off the trade and business along the public works of Pennsylvania, diminish her revenue and render her improvements useless.

The answer of the defendants is given in 9th Howard, 650, in substance, that the sovereignty of Virginia over this place had never been ceded; that the States might erect bridges; that the passage by ferry was dilatory and precarious; that the elevation of the bridge was ninety-three and one-half feet above low water; that the work had been progressing eighteen months before the bill was filed; that the State of Pennsylvania had no corporate capacity to bring this suit to protect her citizens; that she had authorized similar bridges to be built, and lastly, that it would not diminish the Pittsburg trade.

Mr. Justice Grier ordered that the papers be filed with the clerk of the Supreme Court of the United States, and the complainant have leave to move there for an injunction.

After argument at January term, 1850, the Supreme Court, by Mr. Justice Nelson, referred the cause to Hon. R. Hyde Walworth, Ex. Chancellor of New York, as Commissioner to take proofs.

Mr. Justice Daniel dissented, the State of Pennsylvania, in his opinion, having no direct interest, and the question of nuisance or no nuisance being cognizable in a court of law.

In 13 Howard, 520, the plaintiffs points are stated—

1st. That the Ohio river is a public highway of commerce regulated by Congress.

2d. That it cannot be lawfully obstructed by State authority.

3d. That the bridge having been found by the commissioner's report to be a nuisance, may be abated by a Court of Equity.

4th. That the State might maintain the suit.

5th. That the Supreme Court of the United States had power to grant relief.

THE DEFENDANTS CONTENDED, (13 Howard, 545.)

1st. That the order made by Judge Grier, August 1, 1849, was not warranted by practice, and that the case was improperly docketed.

2d. That the proper authorities of Pennsylvania had not authorized the suit.

3d. That the State had no direct interest in the controversy.

4th. That her citizens could be heard elsewhere.

5th. That the bridge was not a nuisance.

6th. That there had been delay in filing the bill.

The opinion of the court was delivered by

MR. JUSTICE M'LEAN,

Who said, (13 Howard, 578,) "For the reasons and facts stated, "we think that the bridge obstructs the navigation of the Ohio, "and that the State of Pennsylvania has been, and will be, injured in her public works in such manner as not only to authorize "the bringing of this suit, but to entitle her to the relief prayed." "Believing, from the estimates in the case, that the obstruction "to the navigation of the river may be removed by elevating the "bridge, at an expense which, when added to the original cost, will "leave a reasonable profit to the stockholders on the entire capital "expended, we have endeavored to ascertain the lowest point "of elevation which will secure this object, and, on a full view of "the evidence, we are brought to the conclusion, that an elevation "of the lowest parts of the bridge for three hundred feet over the "channel of the river, not less than one hundred and eleven feet "from low water mark, will be sufficient."

MR. CHIEF JUSTICE TANEY dissented, (page 579.)

He conceded that Pennsylvania had the right to sue, and that the Ohio was a public navigable stream, upon which Congress had the power to regulate commerce, to prohibit obstructions to navigation, to declare them nuisances and to direct the mode of their removal.

But he added: "This power has not been exercised." There is no act "regulating the height of bridges over the river." If a public nuisance, it was indictable, but not in the United States courts.

Referring to Gibbons *vs.* Ogden, he said that the only question there was, whether all vessels "licensed by Congress had not the right to pass over the same waters as freely as the vessels of the monopolists."

In this case, Virginia has passed no law giving exclusive privileges to navigate the Ohio. If the bridge is an obstruction, her own citizens are equally disabled with others. Upon this point he cites Wilson *vs.* The Blackbird Creek Co., 2 Peters, 245.

He was also opposed to the decree because the evidence was conflicting.

MR. JUSTICE **DANIEL** also dissented, (page 593,) because—

1st. The State had no jurisdiction as a party.

2d. Because Congress had never legislated as to bridges over the Ohio.

3d. That the bridge was not a nuisance.

4th. That its erection was authorized by Virginia.

June 26, 1854. In vacation, MR. JUSTICE **GRIER** granted an injunction restraining the erection of the bridge at an elevation less than that prescribed in the decree of the Supreme Court in May, 1852, (13 How., 627.)

In 18 Howard, 426: Mr. F. W. Hughes, Attorney General, and Mr. Stanton, moved for an attachment. Mr. Johnson and Mr. Charles M. Russel moved to dissolve the injunction, the principal point being that Congress had legalized the Wheeling bridge by act of August 31, 1852.

It was contended by the State that the act of Congress was unconstitutional, because it annulled the judgment of the court already rendered.

The opinion of the court was delivered by

MR. JUSTICE **NELSON**,

Who said that the decree for costs could not be affected by the subsequent law, *but that the order enjoining its continuance as an obstruction was no longer in force.*

If the bridge had been taken down it could not be doubted that, after the passage of the law, the defendants could re-construct it.

COOLEY vs. THE BOARD OF WARDENS, 12 Howard, 311, (1851.)

A State law requiring every vessel without a pilot to pay a certain penalty is not unconstitutional. The State has the power to regulate its pilots.

(Counsel.) Messrs. MORRIS and TYSON for COOLEY.
Messrs. CAMPBELL and DALLAS for BOARD of WARDENS.

(Statute reviewed.) The act under review was a law passed in 1803, by Pennsylvania, which enacted that every ship or vessel arriving from or bound to any foreign port or place, and every ship or vessel of the burden of 75 tons or more, sailing from or bound to any port not within the river Delaware, shall be obliged to receive a pilot, &c. And if the master of any such ship or vessel shall refuse or neglect to take a pilot, the master, owner or consignee of such vessel shall forfeit and pay to the warden a sum equal to half the pilotage of such ship or vessel.

(History.) Cooley was the consignee of a vessel, which sailed from Philadelphia without a pilot when one could have been had.

The board of wardens brought suit against him for the half pilotage.

He pleaded that the law was repugnant to the Constitution of the United States. The Supreme Court of the State decided that the act was not at variance with any of the provisions of the Constitution or laws of the United States.

The opinion of the Supreme Court of the United States was delivered by

MR. JUSTICE CURTIS.

He held that pilotage fees are not duties within the meaning of the Constitution, and that appropriating the sums received to charity did not impose on it the character of a revenue law. (p. 313.)

He says: "The provision of the Constitution was intended to "operate upon subjects actually existing and well understood when "the Constitution was formed. Imposts and duties on imports, "exports and tonnage were then known to the commerce of a "civilized world to be as distinct from fees and charges for pilot-"age, and from the penalties by which commercial States enforced "their pilot laws, as they were from charges for wharfage or ton-"nage, or any other local port charges for services rendered to "vessels or cargoes; and to declare that such pilot fees or penal-"ties are embraced within the words imposts or duties on imports, "exports or tonnage, would be to confound things essentially differ-"ent, and which must have been known to be actually different "by those who used the language. It cannot be denied that a "tonnage duty or an impost on imports or exports may be levied "under the name of pilot dues or penalties, and certainly it is "the thing and not the name which is to be considered. But "having previously stated that in this instance the law complained "of does not pass the appropriate line which limits laws for the "regulation of pilots and pilotage, the suggestion, that this law "levies a duty on tonnage or on imports or exports, is not admis-"sible." (p. 314.)

He says: "It becomes necessary, therefore, to consider whether "this law of Pennsylvania, being a regulation of commerce, is "valid." (p. 317.)

"The grant of commercial power to Congress does not contain "any terms which expressly exclude the States from exercising "an authority over its subject matter. If they are excluded it "must be because the nature of the power thus granted to Con-"gress requires that a similar authority should not exist in the "States. If it were conceded on the one side that the nature of "this power, like that to legislate for the District of Columbia, is "absolutely and totally repugnant to the existence of similar "power in the States, probably no one would deny that the grant "of the power to Congress as effectually and perfectly excludes "the States from all future legislation on the subject, as if express "words had been used to exclude them; and, on the other hand, "if it were admitted that the existence of this power in Congress, "like the power of taxation, is compatible with the existence of "a similar power in the State, then it would be in conformity with "the contemporary exposition of the Constitution." (Federalist, No. 32, p. 318.)

He says: "Whatever subjects of this power are in their nature "national, or admit only of one uniform system or plan of regu-"lation, may justly be said to be of such a nature as to require "exclusively legislation by Congress. That this cannot be affirmed "of laws for the regulation of pilots and pilotage is plain. The "act of 1789 contains a clear and authoritative declaration by "the first Congress, that the nature of the subject is such that "until Congress find it necessary to exert its power, it should be "left to the legislation of the States; that it is local and not na-"tional."

For these reasons the court were of opinion that the State law was constitutional, and the judgment of the Supreme Court was affirmed.

Mr. JUSTICE M'LEAN and Mr. JUSTICE WAYNE dissented.

Mr. JUSTICE DANIEL concurred in the judgment, but dissented as to its reasoning.

HAYS vs. THE PACIFIC MAIL STEAMSHIP Co.,

17 Howard, 596, (1854.)

A State law imposing a tax on vessels temporarily within its limits, with their situs at the home port, is unconstitutional.

(Counsel.) Messrs. BRENT and MAY, for the PLAINTIFF.

Messrs. DAVIDGE and VINTON, for the DEFENDANTS.

(History.) The question here involved was whether the State of California had the right to impose a tax on twelve steamships temporarily within the jurisdiction of the State.

It was contended by the defendants that they were an incorporated company of New York; that all the stockholders were residents and citizens of that State; that the principal office for transacting the business of the company was in New York, but, for the better transaction of their business, they had agencies in Panama, San Francisco, &c.; that they had a naval dock and ship yard at Benicia, California, for furnishing and repairing their steamers; that on their arrival at the port of San Francisco they remained no longer than was necessary to land their passengers, mails, &c.; that they were engaged in the business of transporting passengers, merchandise, &c., between New York and San Francisco; that the company were sole owners of the vessels; that said vessels were employed exclusively in navigating the waters of the ocean; that they were all duly registered in the custom-house in New York, and that taxes had been assessed upon the capital represented by the steamers, in the State of New York, under the laws of that State, ever since they had been employed in navigation.

The case came up on writ of error to the District Court of United States for the Northern district of California.

The Supreme Court of the United States decided that the State of California had no jurisdiction over these vessels for the purpose of taxation.

The opinion of the Supreme Court of the United States was delivered by

MR. JUSTICE NELSON.

He says: "We are satisfied that the State of California had no "jurisdiction over these vessels for the purpose of taxation. They "were not abiding within its limits, so as to be incorporated with "other personal property of the State; they were there but tem-"porarily, engaged in lawful trade and commerce, with their *situs* "at their home port, where the vessels belonged, and where the "owners were liable to be taxed for capital invested, and where "the taxes had been paid." (p. 600.)

MR. JUSTICE DANIELS dissented,

On the grounds that neither the Circuit Court or Supreme Court had jurisdiction.

MR. JUSTICE CAMPBELL concurred.

He says: "The material fact is, that the vessels were in *transitu*, having no *situs* in California, nor permanent connections "with its internal commerce."

For these reasons the judgment of the court below was affirmed.

STATE vs. NORTH, 27 Missouri, 465, (1858.)

A State law requiring merchants dealing in the manufactures of sister States to take out a license establishes a discrimination, and is unconstitutional.

(Counsel.) Messrs. SHEPLEY, GAMBLE and HANNEGAN for NORTH.
Mr. MAURO for the STATE.

(Statute reviewed.) The act under review in this case was a law passed in 1855 by Missouri, which provided that merchants should pay a tax upon all goods, wares and merchandise purchased by them, except such as may be the growth, produce or manufacture of that State, and except such unmanufactured articles as may be the growth or produce of other States.

(History.) It appeared at the trial that North had been importing into the State and selling without a license, manufactured articles of other States.

He argued that the tax was unconstitutional.

The Criminal Court of St. Louis gave judgment against the defendant.

The opinion of the Supreme Court of the State was delivered by

JUDGE SCOTT.

The question involved in this case "is the power of the States, "in the exercise of the right of taxation, to discriminate between "products of the State and those manufactured in sister States.' (p. 471.)

He refers to Gibbons *vs.* Ogden, 9 Wheat., 1, "and says that the "extent to which the power to regulate commerce may be exer-"cised, cannot be fully defined by prospective laws. It is a power "whose exercise depends on contingencies which cannot be fore-"seen, and although the supreme power to regulate commerce is "in Congress, yet it is conceded that the States have the power "to regulate their own internal affairs."

"While it is admitted that all the property in the State subject "to private ownership is liable to taxation, it is no diminution of "this power so to limit its exercise as to prevent a discriminating "tax between similar articles." (p. 478.)

"We do not conceive that the opinion that we entertain in the "least injuriously affects the power of taxation of the State; on "the contrary, by requiring the same tax to be levied on like "articles produced or manufactured in the States, we rather in-"crease the revenue. Nothing is to be gained by the exercise of "the power of laying a discriminating tax." (p. 482.)

For these reasons the judgment was reversed and defendant discharged.

JUDGE NAPTON dissented.

He says: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States or to the people." A power to tax all the persons and property and occupations within the limits of the State is a necessary incident to State sovereignty, and if that power has been abandoned or restricted, the abandonment must be found clearly expressed or necessarily implied in the provisions of the Federal Constitution. (p. 483.)

He refers to License cases, and says: "Chief Justice Taney, "with Judges Nelson, Woodbury, Daniel and Catron, were of "opinion that every object proposed to be accomplished, and "which ought to be accomplished, consistent with a due mainte-"nance of State sovereignty and State safety, was obtained by "construing this provision to yield a supremacy to federal legis-"lation, and not to exclude necessarily all State legislation on "the subject." (p. 485.)

"That it may indirectly affect such commerce is admitted, and "so must every tax upon the merchant and upon his merchandise, "but this does not make it unconstitutional, or we must cut off "from the States all power of taxing articles imported from "abroad." (p. 488.)

"If the power to regulate commerce is totally denied to the "States, and exclusively vested in Congress, and every tax which "reaches the interest of commerce and has a tendency to diminish "or restrict it, either with foreign nations or between the States, "is such a regulation of commerce as has been confided exclu- "sively to the federal government. Steamboats cannot be taxed, "merchants cannot be taxed, and the limits of State taxation are "exceedingly narrow. It is difficult to see how the States can "tax any business whose range extends beyond her territorial "limits, or any pursuit which is based upon an exchange of for- "eign for domestic productions." (p. 489.)

He says: "I quote from Judge Woodbury, from the bench of "the Supreme Court of the United States, 'it is perfectly compe- "tent for the States to assess a higher tax or excise, by way of "license or direct assessment, on articles of foreign rather than "domestic growth belonging to her citizens.'" (p. 494.)

ALMY vs. CALIFORNIA, 24 Howard, 169, (1860.)

A State law imposing a tax upon bills of lading for gold and silver transported from the State is a tax on exports, and therefore unconstitutional and void.

(Counsel.) Mr. BLAIR for ALMY.

Mr. BENJAMIN for CALIFORNIA.

(Statute reviewed.) The act here under review was a law passed by California, to provide a revenue from a stamp tax on certain instruments of writing. Among other instruments mentioned in the law, a stamp tax was imposed on bills of lading for the transportation, from any point or place in that State to any point or place without the State, of gold or silver coin, gold dust or gold or silver bars; and the law required that there should be attached to the bill of lading, or stamped thereon, a stamp or stamps, expressing the value of such tax or duty.

By a previous law it was made a misdemeanor, punishable by fine, to use any paper without a stamp where the law required stamped paper to be used.

(History.) Almy was the master of a ship lying in the port of San Francisco, and bound to New York, which received a quantity of gold dust for transportation to New York. He signed a bill of lading upon unstamped paper, and without having any stamp attached to it. He was indicted for a misdemeanor.

He contended that the law was repugnant to the Constitution of the United States.

The Court of Sessions decided that the law was not in conflict with the Constitution of the United States, and adjudged that Almy should pay a fine of $100 for the offence.

The opinion of the Supreme Court of the United States was delivered by

MR. CHIEF JUSTICE TANEY.

He says: "That the case cannot be distinguished from Brown "*vs.* State of Maryland, 12 Wheat., 419, which decision has always "been regarded and followed as the true construction of the clause "of the Constitution in question." (p. 173.) * *

If the tax was laid on gold and silver exported, every one would see that it was repugnant to the clause of the Constitution, which says, "that no State shall, without the consent of Congress, lay "any imposts or duties on imports or exports, except what may "be absolutely necessary for executing its inspection laws."

"But a tax or duty on a bill of lading, although differing in "form from a duty on the article shipped, is, in substance, the "same thing. * * * And if the law of California is constitutional, then every cargo, of every description, exported from "the United States, may be made to pay an export duty to the "State, provided the tax is imposed in the form of a tax on the bill "of lading, which would be in direct conflict with the Constitu-"tion."

For this reason (that the tax was a duty on exports) the judgment of the Court of Sessions was reversed.

BANK OF COMMERCE vs. NEW YORK CITY, 2 Black, 620, (1862.)

A State law imposing a tax on stocks, bonds and securities of the United States held by a bank is unconstitutional.

A tax on the nominal capital of a bank, without regard to the nature or value of the property, is annexed to the franchise as a royalty for the grant, and not a burden imposed on the property itself.

(Counsel.) Mr. LORD for BANK OF COMMERCE.

Messrs. DEVLIN and BRADY for NEW YORK CITY.

(History.) The question arising in this case was as to the right of the State to tax the stocks, bonds and securities of the United held by the Bank of Commerce, a corporation of New York city.

The bank rendered its statement, according to law, to the tax commissioners, on which they were to fix the sum or valuation of property on which the taxation of the bank was to be made. From this statement it appeared that the greater part of the capital of the bank was invested in United States stocks, bonds and securities. The tax commissioners reported the bank as subject to assessment and taxation on this part of its capital.

This was contended to be in conflict with the Constitution of the United States.

The Supreme Court of the State confirmed the report of the tax commissioners, and this judgment was affirmed by the Court of Appeals.

The opinion of the Supreme Court of the United States was delivered by

MR. JUSTICE NELSON.

The question involved in this case is, whether or not the stock of the United States, constituting a part or the whole of the capital stock of a bank organized under the banking laws of New York, is subject to taxation.

In New York the tax is upon the property constituting the capital.

He says: "*That the sovereignty of a State extends to everything* "*which exists by its own authority or is introduced by its permission,* "but not to those means which are employed by Congress to carry "into execution powers conferred on that body by the people of "the United States." (p. 632.)

He refers to M'Cullough *vs.* Maryland, 4 Wh., 116, and Osborne *vs.* United States, 9 Wh., 732, and says: "The doctrine main-"tained in those cases is, that the powers granted by the people "of the United States to the general government, and embodied "in the Constitution, are supreme within their scope and opera-"tion, and any interference by the State governments, tending "to the interruption of the full legitimate exercise of the powers "thus granted, is in conflict with the Constitution." (p. 633.)

He refers to M'Cullough *vs.* The State of Maryland, where the Chief Justice says: "If we measure the power of taxation re-"siding in a State by the extent of sovereignty which the people "of a single State possess and can confer on its government, we "have an intelligible standard applicable to every case to which "the power may be applied; we have a principle which leaves "the power of taxing the people and property unimpaired, which "leaves to a State the command of all its resources, and which "places beyond its reach all those powers which are conferred by "the people of the United States on the government of the Union." (p. 634.)

The judgment of the court below was reversed.

ERIE RAILWAY Co. vs. THE STATE OF NEW JERSEY, 2 Vroom, 533, (1864.)

A State law laying a distinctive tax on a transportation of goods from State to State is unconstitutional.

A State cannot tax a foreign corporation on a principle different from that by which she can tax one of her domestic corporations.

(Counsel.) J. W. SCUDDER, DEPUE, SHIPMAN and EATON, for PLAINTIFF IN ERROR.

The ATTORNEY GENERAL for DEFENDANT IN ERROR.

(Statute reviewed.) The question in dispute here arose out of the provisions of the tenth section of the act of March 28, 1862. This section provides, that all corporations regularly doing business in the State, *and not being corporations of the State*, shall be assessed and taxed for and in respect of the business so by them done and transacted in the State, as follows: Every such company shall pay a transit duty of three cents on every passenger, and two cents on every ton of goods, wares and merchandise, or other articles, carried or transported by or for such company, or any railroad or canal in the State, for any distance exceeding ten miles, *except passengers and freight transported exclusively within the State*, &c.

(History.) The company claimed that the act was an infringement on that part of the Constitution of the United States which confers upon Congress the power to regulate commerce with foreign nations and between the several States, &c.

The Supreme Court of the State decided that the tax or duty imposed upon the said corporation was not in violation of the Constitution of the United States.

The opinion of the Court of Errors and Appeals was delivered by

CHIEF JUSTICE BEASLEY.

He says, (p. 533:) "It is not to be denied that a State has the "right to lay taxes which may incidentally affect commerce between the States. Indeed, it is perhaps impossible to imagine "any tax which, in theory, at least, may not be said to have in "the distance such effect. That this class of taxes is legal, upon "both general and constitutional consideration, no one doubts, "but the difficulty always has been to determine with precision "when any given tax which has a tendency to affect a subject "having immunity is within the purview of the Constitution incidental, and when direct." * * *

"That the right to impose this duty on the business would be "the right to tax the commodities themselves, which would produce disorder in the system of inter-State commerce, and between the government of the different States; and that each "State would tax the goods transported through its territory, and "would make the goods unsaleable on account of the high price "that must be asked for the same." (p. 535.)

He says: "That the tax in hand is specific—that is, it affects "but a single interest, viz: The transportation of goods in the "course of traffic from one part of the country to the other; and "that this would make the tax a regulation of commerce, and "that the right to tax for revenue belongs to the general government." (p. 542.)

He refers to Cooley *vs.* Board of Wardens of Port of Philadelphia, 12 How., 299-(545,) and says: "That this case, so far as it "relates to a case similar to the one before the court, is not open "to discussion. In this case it was held that in matters of local "interest Congress had power concurrent with the States; nevertheless, whatever subjects of the power to regulate commerce "were, in their nature, national, or admitted of only one uniform "plan of regulation, were of such a character to require exclusive "legislation of Congress." (p. 545.)

For these reasons, and because the legislative act infringed one of the restrictions, he said that the Legislature of the State had not the constitutional power to levy the tax in question on the business of the plaintiff in error, and the judgment of the Supreme Court was reversed.

GILMAN vs. PHILADELPHIA, 3 Wallace, 713, (1865.)

A State law authorizing a bridge to be erected over a river entirely within the limits of the State is constitutional, Congress having passed no act regulating the navigation of the same.

(Counsel.) Messrs. HARDING and PARKER for GILMAN.

Messrs. SELLERS and F. C. BREWSTER for the CITY OF PHILADELPHIA.

(Statute reviewed.) The act under review was a law passed in 1857 by Pennsylvania, authorizing the city of Philadelphia to erect a permanent bridge over the Schuylkill river at Chestnut street.

(History.) Gilman owned valuable coal wharves on the west side of the river, and above where the bridge was proposed to be erected.

He charged that a bridge at that point, without suitable draws, would be an unlawful obstruction to the navigation of the river, and an illegal interference with his rights.

The opinion of the Supreme Court of the United States was delivered by

MR. JUSTICE SWAYNE.

He refers to the Wheeling bridge case, 18 Howard, 435, and says: "That the principle is the same, but in that case Congress "had acted upon the subject and had regulated the Ohio river, "and therefore the act was in conflict with the acts of Congress." (p. 727.)

He refers to the clause of the Constitution, which says, "that "the powers not delegated to the United States by the Constitu-"tion, nor prohibited by it to the States, are reserved to the States "respectively or to the people." (p. 724.)

He refers to Pollard's Lessee *vs.* Hagan, 3 Howard, 230. The court there decided "that the right of eminent domain over the "shores and soils of navigable waters, for all municipal purposes, "belongs exclusively to the States, within their respective terri-"torial jurisdiction, and they and they only have the constitu-"tional power to exercise it, but it cannot be used so as to affect "the exercise of any national right of eminent domain or juris-"diction with which the United States have been invested by the "Constitution." (p. 726.)

He refers to Gibbons *vs.* Ogden, which decides "that the in-"spection laws form a portion of that immense mass of legisla-"tion which embraces everything within the territory of a State, "not surrendered to the general government, such as inspection "laws, quarantine laws, as well as laws for regulating the internal "commerce of a State." (p. 726.)

He says, "that some of the subjects call for uniform rules and "national legislation, and others can be best regulated by rules "and provisions suggested by the varying circumstances and "limited in their operation to such localities. To this extent the "power to regulate commerce may be exercised by the States." (p. 727.)

He says: "Whether the power in any given case is vested ex-"clusively in the general government depends upon the nature "of the subject to be regulated." (p. 727.)

He refers to Wilson *vs.* the Blackbird Creek Marsh Co., 2 Peters, 250, in which Chief Justice Marshall says, "that unless the "law authorizing the bridge comes in conflict with the Constitu-"tion of the United States, or an act of Congress, it is an affair "between the State and its citizens." (p. 729.)

The States, he says, may exercise concurrent or independent power in all but three cases—

1. "Where the power is lodged exclusively in the Federal Constitution."

2. "Where it is given to the United States and prohibited to the States."

3. "Where, from the nature and subjects of the power, it must necessarily be exercised by the national government exclusively." Houston *vs.* Moore, 5 Wheaton, 49. Federalist, No. 32.

Many abuses may arise in the legislation of the States which are wholly beyond the reach of the national government.

For the reasons given the decree of the Circuit Court was affirmed.

Mr. JUSTICE CLIFFORD (with whom concurred WAYNE and DAVIS, J. J.) dissented,

On the ground that Congress had passed an act regulating the navigation of the river, and that the exclusive power of regulating commerce was vested in Congress.

STEAMSHIP COMPANY vs. PORT WARDENS, 6 Wallace, 31, (1867.)

A State law enacting that the master and wardens of a port shall receive five dollars for every vessel arriving in harbor, is unconstitutional.

(Counsel.) Mr. DURANT for PORT WARDENS.
Mr. SALOMAN for STEAMSHIP COMPANY.

(Statute reviewed.) The act under review was a law passed in 1855 by the State of Louisiana, which enacted that the master and wardens of New Orleans should be entitled to demand and receive, in addition to other fees, the sum of five dollars for every vessel arriving in that port.

(History.) Under this act the sum of five dollars was demanded of the steamship Charles Morgan, belonging to the Southern steamship company of New Orleans, and payment being refused suit was brought against the owner, and judgment recovered in a justice's court, which judgment was affirmed by the Supreme Court of the State.

The opinion of the Supreme Court of the United States was delivered by

MR. CHIEF JUSTICE CHASE.

He refers to the fact that the power to regulate commerce with foreign nations and among the States is vested in Congress, and that no State can lay any duties on imports or exports, or any duty on tonnage, without the consent of Congress, except what may be absolutely necessary for executing its inspection laws. (p. 33)

He says: "That this, however, was not intended to interfere "with the exercise of State authority upon subjects properly "within State jurisdiction. That the State has the power to "enact laws, the exercise of which may in various degrees affect "commerce, and these have always been held not to be within "the grant of Congress, among these are quarantine, and laws "regulating the internal trade of the State." (p. 33.)

He says: "We think it quite clear, therefore, that the regulation of commerce made by this act comes within none of the limitations or exceptions to the general rule of the Constitution, that the regulation of commerce among the States is in Congress. (p. 34.)

He however calls it a duty on tonnage, and says, that "the general prohibition upon the States against levying duties on imports or exports, would have been ineffectual if it had not been extended to duties on the ships which serve as the vehicles of conveyance." (p. 35.)

For these reasons he is of the opinion that the act is repugnant to the Constitution of the United States, and the judgment of the Supreme Court of the State was reversed.

LOUISIANA vs. KENNEDY, 19 Louisiana Annual Reports, 397, (1867.)

A State law is unconstitutional which imposes a tax on property brought from another State for sale or re-shipment.

NOTE.—This State decision is admitted to be in conflict with the cases hereinafter cited from the Reports of the Supreme Court of the United States.

(Counsel.) Messrs. DUPLANTIER and HERRON for the State.

Messrs. CAMPBELL, SPOFFORD and ROSELIUS for KENNEDY.

(Statute reviewed.) The act under review was a law passed in 1865 by Louisiana, which levied a tax of one quarter of one per cent. on the annual gross sales or receipts of each and every person pursuing any trade, profession or occupation, whose annual receipts exceeded the sum of two thousand dollars.

(History.) This tax was assessed against Kennedy, who was a commission merchant.

He pleaded that the act imposing the tax was in violation of the Constitution of the United States.

The District Court decided in favor of Kennedy.

The opinion of the Supreme Court of the State was delivered by

TALIAFERRO, J.

He refers to section ten of the first article of the Constitution, that no State, without the consent of Congress, shall lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.

He says it is shown that "the products sold were put up and "prepared by the owners in the States from whence they were "brought, and sold in the same form in which they came here, "and that the defendants have no interest whatever in the pro-"ceeds, beyond their commissions for making the sales."

"Until there was a change in the ownership and condition of "the goods, so that they became incorporated with and form part "of the property of the State, they are not subject to State taxa- "tion." (p. 426.)

He says: "No matter what the former opinion may have been, "favoring the view that the power to regulate commerce among "the States is not exclusively vested in Congress, we consider "that the authorities are decidedly against that opinion." (p. 426.)

He refers at length to a number of cases, and affirmed the judgment of the District Court.

In this case the Attorney General of Louisiana made a very able argument, reviewing most of the cases cited by the present plaintiffs in error. The following extracts are submitted from his brief:

It is urged that the act in question is in conflict with—

1st. The second clause of the tenth section of the first article of the Constitution of the United States, which provides: "That no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports, shall be for the use of the United States."

2d. Also, with the third clause of the eighth section of the first article, which empowers Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

Does the prohibition contained in the second clause of the tenth section, first article, include articles and merchandise brought into one State from another State, or does the word "imports" mean articles, etc., brought into the United States from abroad, from foreign countries?"

It is submitted that this prohibition refers exclusively to "imports" from foreign countries. Such, it is thought, is the universal acceptation of the term, as well as the interpretation placed upon it by the highest authority.

In the *License* cases, 5 Howard, 594, Mr. Justice M'Lean says: "And it is supposed that the declaration 'that no State, without "the consent of Congress, shall lay any impost or duties on im-

"ports or exports,' except what may be absolutely necessary for "executing its inspection laws, refers to foreign commerce."

Again, he says: "The word import, in a commercial sense, "means the goods or other articles brought into this country from "abroad—from another country. In this sense, an importer is a "a person engaged in foreign commerce, and it appears that in the "acts of Congress which regulate foreign commerce, he is spoken "of in that light."

Mr. Justice Catron, in the same case, says: "Had the gin imported been an import from a foreign country, then the license "law prohibiting its sale by the importer, would be void." (5 Howard, p. 601.)

Mr. Justice Daniel, same case, p. 614, says: "Imports, in a "political or fiscal, as well as in a common practical acceptation, "are, properly, commodities brought in from abroad, which either "have not reached their perfect investiture or their alternate destination as property within the jurisdiction of the State, or which "still are subject to the power of the government for a fulfillment "of the conditions upon which they have been admitted to entrance," etc.

It is evident, from a careful examination of the case of *Andrew Pierce, et al., vs. The State of New Hampshire*, one of the "*license* cases," above quoted from, (5 Howard, page 554,) that the court must have adopted the interpretation here contended for, as the majority of the court recognize the correctness of the decision in *Brown vs. Maryland*, (12 Wheaton, 419;) that a State was without constitutional power to require license from an importer before he was permitted to sell in the original package; and the facts in *Pierce vs. New Hampshire* are, that Pierce brought from the State of Massachusetts, into the State of New Hampshire, a barrel of gin, and sold it in the cask in which it was brought, without the license required by the law of New Hampshire—certainly affording in every respect a parallel case with that of *Brown vs. Maryland*, if the word "imports," in the clause of the Constitution, means "articles," etc., brought from one State into another, as well as those brought into the country from abroad; and yet the court sustain the law of New Hampshire, requiring the license.

Mr. Justice M'Lean, in the same case, (5 Howard, p. 594,) says: "In *Brown vs. The State of Maryland*, (12 Wheaton, 443,) the "court say: 'The act of Maryland denies to the importer the "right of using the privilege which he has purchased from the "United States until he has purchased it from the State.'" And it was upon the ground that the tax was an additional charge or impost upon the thing imported, which a State could not impose, that the above act was held to be unconstitutional.

But neither the facts nor the reasons of that case apply to a person who transports an article from one State to another. In some cases the transportation is only made a few feet or rods, and generally it is attended with little risk, and no duty is paid to the State or Federal government. And *why should property, when conveyed over a State line, be exempt from taxation which is common to all other property of the State?*

M'Culloch's Commercial Dictionary, verbis, importation and exportation: "The bringing of commodities from and sending them to other countries."

Art. 10. Amendments to the Constitution. "The powers not "delegated to the United States by the Constitution, nor pro- "hibited by it to the States, are reserved to the States, respec- "tively, or to the people. A cardinal principle now invoked as a "good starting point in the investigation of all questions of con- "flict between the action of States and the Federal Constitution, "and to the same purport, is the interpretation found in the 32d "number of the Federalist.

"An active consolidation of the States into one complete na- "tional sovereignty would imply an entire subordination of the "parts, and whatever powers might remain in them would be al- "together dependent on the general will. But as the plan of the "convention aims only at a partial union or consolidation, the "State governments would clearly retain all the rights of sov- "ereignty which they before had, and which were not by that act "exclusively delegated to the United States. This exclusive dele- "gation, or rather this alienation, of State sovereignty would only "exist in three cases: Where the Constitution, in express terms, "granted an exclusive authority to the Union; and, in another, "prohibited the States from exercising the like authority; and "where it granted an authority to the Union, to which a similar "authority in the States would be absolutely and totally *contra- "dictory* and *repugnant.* I use these terms to distinguish this last "case from another, which might appear to resemble it, but which "would, in fact, be essentially different. I mean where the exer- "cise of a concurrent jurisdiction might be productive of occa- "sional interferences in the *policy* of any branch of administra- "tion, but would not imply any direct contradiction or repugnancy "in point of constitutional authority." * * *

"A case which may, perhaps, be thought to resemble the latter, "but which is, in fact, widely different, affects the question im- "mediately under consideration. I mean the power of imposing "taxes on all articles other than exports or imports. This, I con- "tend, is manifestly a concurrent and co-equal authority in the "United States and in the individual States. There is plainly NO "expression in the granting clause which makes that power *ex- "clusive* in the Union. There is no independent clause or sen- "tence which prohibits the States from exercising it. So far is "this from being the case, that a plain and conclusive argument "to the contrary is deducible from the restraint laid upon the "States in relation to duties on imports and exports. This *re- "striction implies an admission that if it were not inserted the States "would possess the power it excludes; and it implies a further ad- "mission, that as to all other taxes the authority of the States re- "mains undiminished,"* &c.

"It may be objected to this definition, that the power of taxa- "tion *is not confined to the people and property of a State. It may "be exercised on every object brought within its jurisdiction.* THIS "IS TRUE. But to what source do we trace the right? It is ob- "vious that it is an incident of sovereignty, and is co-extensive "with that to which it is an incident. *All subjects over which the "sovereign power of a State extends are objects of taxation; but those "over which it does not extend are, upon the soundest principles, ex- "empt from taxation.* This proposition may be almost pronounced "self-evident.

"*The sovereignty of a State extends to everything which exists by "its own authority, or is introduced by its permission;* but does it "extend to those means which are employed by Congress to carry "into execution powers conferred on that body by the people of "the United States? We think it demonstrable that it does "not," &c.

Chief Justice Marshall's opinion of the court in *M'Cullough vs. State of Maryland*, 4 Wheaton, 316.

In this case it is decided that a State tax on the operations of the Bank of the United States is unconstitutional. One of the restrictions upon the power of the States is shown in the decision, but the reasoning of the Chief Justice demonstrates the correctness of the position, that the power is plenary and general, and that the restrictions are exceptional, and, of course, must clearly appear to be recognized.

"The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body "politic."

"This is an original principle which has its foundation in society "itself. It is granted by all for the benefit of all. It resides in "government as a part of itself, and need not be reserved when "property of any description, or the right to use it in any manner, "is granted to individuals or corporate bodies. However absolute the right of an individual may be, it is still in the nature "of that right, that it must bear a portion of the public burdens, "and that portion must be determined by the Legislature. *This* "*vital power may be abused, but the Constitution of the United* "*States was not intended to furnish the corrective for every abuse of* "*power which may be committed by the State governments.* The interest, wisdom and justice of the representative body, and its "relations with its constituents, furnish the only security where "there is no express contract against unjust and excessive taxation, as well as against unwise legislation generally." Chief Justice Marshall's opinion of the Court in *Providence Bank vs. Billings*, 4 Peters, p. 563.

Again, in the same case, the Chief Justice says: "That the "taxing power is of vital importance; that it is essential to the "existence of government, are truths which it cannot be necessary "to re-affirm. They are acknowledged and asserted by all. It "would seem that the relinquishment of such a power is never to "be assumed." * * * "But as the whole community is inter-

"ested in retaining it undiminished, that community has a right "to insist that its abandonment ought not to be presumed in a "case in which the deliberate purpose of the State to abandon it "does not appear."

The *License* cases, 5 Howard, p. 573, already quoted from, are again referred to, and an extract from the opinion of M'Lean, J., subjoined.

"The owner of the property who purchased it in Massachusetts "and transported it to New Hampshire, is not an importer in the "sense in which that term is used in *Brown vs. Maryland.* And "there is nothing in the general reasoning of that case, or in the "facts which can bring into doubt the constitutionality of the "New Hampshire law."

"*If the mere conveyance of property from one State to another "shall exempt it from taxation, and from general State regulation, it "will not be difficult to avoid the police laws of any State, especially "by those who live at or near the boundary.*"

In *Gibbons vs. Ogden*, 9 Wheaton, p. 201, Marshall, C. J., in delivering the opinion of the court, says: "We must first determine "whether the act of laying duties or imposts on imports or exports is considered in the Constitution as a branch of the taxing "power, or of the power to regulate commerce. We think it very "clear that it is considered as a branch of the taxing power. It "is so treated in the first clause of the eighth section: 'Congress "shall have power to lay and collect taxes, duties, imposts and "excises,' and before commerce is mentioned, the rule by which "the exercise of this power must be governed is declared. It is "that all duties, imposts and excises shall be uniform. In a separate clause of the enumeration the power to regulate commerce "is given as being entirely distinct from the right to levy taxes "and imposts, and as being a new power not before conferred. "The Constitution then considers these powers as substantive, "and distinct from each other, and so places them in the enumeration it contains. The power of imposing duties on imports is "classed with the power to levy taxes, and that seems to be its "natural place; but the power to levy taxes could never be considered as abridging the right of the State on that subject, and "they might, consequently, have exercised it by levying duties "on imports or exports, had the Constitution contained no prohibition on this subject. *The prohibition, then, is an exception "from the acknowledged power of the States to levy taxes, not from " the questionable power to regulate commerce."*

If this able commentary be correct, the deduction irresistibly drawn from it is, even if the power in Congress to regulate commerce is exclusive, that the only restriction upon the taxing power of the State is found in the prohibition contained in the clause relative to "imports and exports," they being, as contended above, articles brought in from foreign countries--the power to regulate commerce embracing no prohibition; consequently there is no prohibition against taxing articles brought into one State from another.

Mr. Chief Justice Taney, in the *Passenger* cases, 7 Howard, 480, after endorsing and affirming the above doctrine, very fully says:

" I may therefore safely assume that, according to the true con- " struction of the Constitution, the power granted to Congress to " regulate commerce did not in any degree abridge the power of " taxation in the States, and that they would at this day have the " right to tax the merchandise brought into their ports and har- " bors by the authority and under the regulations of Congress, " had they not been expressly prohibited.

" They are expressly prohibited from laying any duty on imports " or exports, except what may be absolutely necessary for exe- " cuting their inspection laws, and also from laying a tonnage " duty. So far their taxing power over commerce is restrained, " but no further. *They retain all the rest, and if the money de- " manded is a tax upon commerce, or the instrument or vehicle of " commerce, it furnishes no objection to it unless it is a duty on im- " ports or a tonnage duty, for these alone are forbidden."*

Justice Woodbury, in *Passenger* cases, 7 Howard, 531: "The " power of taxation, generally, in all independent States, is un- " limited as to persons and things, except as they may have been " pleased, by contract or otherwise, to restrict themselves. Such " a power, likewise, is one of the most indispensable to their wel- " fare, and even their existence. * * * *

" *But in all cases of doubt the leaning may well be towards the " States*, as the general government has ample means, ordinarily, "by taxing imports, and the States limited means, after parting "with that great and vastly increased source of revenue connected "with imports. The States may, therefore, and do, frequently, tax "everything but exports, imports and tonnage as such. They "*daily tax things connected with foreign commerce, as well as domestic trade. They can tax the timber, cordage and iron of which the* "*vessels for foreign trade are made; tax their cargoes to their owners as stock in trade; tax the vessels as property, and tax the owners* "*and crew per head for their polls. Their power in this respect* "*travels over water as well as land, if only within their territorial* "*limits.*"

Mr. Justice M'Lean, rendering the opinion of the court in *Nathan vs. Louisiana*, 8 Howard, 82, says:

"The taxing power of a State is one of its attributes of sovereignty, and where there has been no compact with the Federal "Government, or cession of jurisdiction, for the purposes specified "in the Constitution, this power *reaches all the property and business within the State,* which are not properly denominated the "means of the General Government; and, as laid down by this "court, it may be exercised at the discretion of the States. *The* "*only restraint is found in the responsibility of the members of the* "*Legislature to their constituents. If this power of taxation by a* "*State, within its jurisdiction, may be restricted beyond the limitation stated, on the ground that the tax may have some indirect bearing on foreign commerce, the resources of a State may be thereby* "*essentially impaired. But State power does not rest on a basis so* "*undefinable. Whatever exists within its territorial limits in the* "*form of property, real or personal, with the exceptions stated, is* "*subject to its laws, and also the numberless enterprises in which its* "*citizens may be engaged. These are subjects of State regulation* "*and State taxation, and there is no Federal power under the Constitution which can impair this exercise of State sovereignty.*"

CRANDALL vs. NEVADA, 6 Wallace, 35, (1867.)

A State law imposing a tax on every person leaving the State by any railroad or stage is unconstitutional.

(Counsel.) No counsel for CRANDALL.

Messrs. P. PHILLIPS and T. J. D. FULLER for NEVADA.

(Statute reviewed.) The act under review was a law passed in 1865 by Nevada, levying a capitation tax of $1.00 upon every person leaving the State by railroad, coach or other vehicle, and directing that the proprietors should pay said tax of $1.00 for every person so conveyed from the State.

(History.) Crandall was arrested for not reporting and for not paying the tax.

He pleaded that the law was in conflict with the Constitution of the United States.

The Supreme Court of the State decided that the law was not an impost on exports, nor an interference with power of Congress to regulate commerce.

The opinion of the Supreme Court of the United States was delivered by

Mr. JUSTICE MILLER.

He held that the statute imposed a tax upon the passengers for the privilege of leaving the State or passing through it. (p. 40.)

He referred to the Passenger cases (7 Howard, 283) as ruling that foreigners coming to this country were imports, but intimated a doubt as to this being a satisfactory ruling. (p. 41.)

In reference to the power to regulate commerce he alludes to the former differences of opinion, and adopts the distinction established by *Cooley vs. Board of Wardens*, (12 How., 299,) that—

"Whatever subjects of this power are in their nature national, "or admit of one uniform system, may justly be said * * to "require exclusive legislation by Congress."

He also cites Gilman *vs.* Philadelphia, (3 Wallace, 713,) and adds, that inasmuch as the tax does not institute any regulation of commerce of a national character, it is not easy to maintain that it violates this clause of the Federal Constitution. (p. 43.)

But he shows that the government has the right to the presence of her citizens at the Capital and elsewhere in time of war; (p. 43;) that the citizen has his correlative right.

And he refers to the dissenting opinion of the Chief Justice in the Passenger cases: "Every citizen has the right of free access "not only to the principal departments at Washington, but also "to its judicial tribunals, and in every State in the Union."

For these reasons the judgment of the Supreme Court of Nevada was reversed.

Mr. JUSTICE CLIFFORD and the CHIEF JUSTICE agreed with the conclusion, but dissented from the reason assigned by the majority of the court. They held that the statute of Nevada was "inconsistent with the powers conferred upon Congress to regu-"late commerce among the several States."

HINSON vs. LOTT, 8 Wallace, 152, (1868.)

A State law that imposes the same tax on all liquors brought into the State, as those manufactured in the State, is constitutional, and is not a regulation of commerce among the States.

(Counsel.) Mr. CAMPBELL for HINSON.
Mr. PHILLIPS for LOTT.

(Statute reviewed.) The act under review was a law passed in 1866 by Alabama, which enacted that before it should be lawful for any dealer or dealers in spirituous liquors, to offer any such liquors for sale within the State, the dealer or dealers introducing any such liquors into the State for sale, should first pay the tax collector of the county into which such liquors were introduced, a tax of fifty cents per gallon for each and every gallon thereof.

(History.) Hinson set forth that he had on hand several barrels of whisky consigned to him by one Dexter, of the State of Ohio, to be sold, on account of the latter, in the State of Alabama, and which he was offering for sale in the same packages in which they were imported.

It was contended that the tax provided for in the act was in conflict with the Constitution of the United States. The Supreme Court of the State decided that the State had the right to impose a tax upon the sale of liquor introduced from another State.

The opinion of the Supreme Court of the United States was delivered by

Mr. JUSTICE MILLER.

He says: "That if the thirteenth section of the act stood alone, "all the liquors brought into the State from another State would "be taxed, and the same class of liquors manufactured in the "State would escape the tax, but by the other sections of the act, "*all liquors, whether brought into the State or manufactured there,* "*are taxed, so that it is not an attempt to regulate commerce, and is* "*not repugnant to the clause of the Constitution.*" (p. 150.)

He refers to Woodruff *vs.* Parham, and says: "That the con- "stitutional provision against taxing imports by the States does "not extend to articles brought from a sister State." (p. 151.)

He refers also to Brown *vs.* Maryland, and says: "That the de- "cision in that case only denounces a State tax on imports, while "the goods imported were held in the original unbroken condi- "tion, and in the hands of the first importer, but as soon as they "passed out of his hands, or the packages were broken, they were "liable to the tax." (p. 151.)

He says, it is true that Congress has the same right to regulate commerce among the States that it has to regulate commerce among foreign nations, and that whenever it exercises that power the State laws must give way, but that Congress has made no such regulations in this case. (p. 151.)

He says: "That the question of the nature of the power to "regulate commerce, and how far that power is exclusively vested "in Congress, has always been a difficult one, and has seldom "been construed in this court with unanimity." (p. 152.)

He says: "That the act does not come under that class of legislation which discriminates adversely to the products of sister "States, as it imposes a tax on all liquors brought into the State "and manufactured in the State alike, and is, therefore, not an "attempt to regulate commerce."

For these reasons the decree of the Supreme Court of the State was affirmed.

Mr. JUSTICE NELSON dissented.

WOODRUFF vs. PARHAM, 8 Wallace, 123, (1868.)

A State law imposing a uniform tax on all sales, whether made by its own citizens or the citizens of another State, is constitutional.

The term import, as used in the Constitution, does not refer to articles imported from one State to another, but only to imported foreign goods.

(Counsel.) Messrs. CAMPBELL and HAMILTON for WOODRUFF.
Mr. PHILLIPS for PARHAM.

(History.) The question involved in this case was, whether the city of Mobile, Alabama, had the right to levy a tax upon sales at auction, &c.

Woodruff and others, auctioneers, received, in the course of their business, for themselves, or as consignees or agents for others, large amounts of goods and merchandise, the product of other States, and sold the same in Mobile to purchasers in the original and unbroken packages. Thereupon the tax collector demanded the tax. Woodruff refused to pay the tax, asserting that it was repugnant to the provisions of the Constitution.

The Supreme Court of the State decided in favor of the tax.

The opinion of the Supreme Court of the United States was delivered by

MR. JUSTICE MILLER.

The question is, can a State tax imports brought into it from other States in the Union.

He defines imports as articles brought into the country, and states that "the clause in the Constitution has no reference to "goods imported from one State to another; that it has exclusive "reference to foreign trade." (p. 134.)

He says: "That if articles brought from one State into another "are exempt from taxation, the grossest injustice would be done." (p. 137.)

He refers to Almy *vs.* California, and Brown *vs.* Maryland, and says: "That it is impossible to examine the opinions without "perceiving that the mind of the writer was exclusively directed "to foreign commerce, and there is no reason to suppose that the "question which we have discussed was in his thoughts. These "cases were decided on the ground that such a tax was a regulation of commerce." (p. 138.)

He refers to the License cases, 5 Howard, 504, and says: "That "none of them held that goods imported from one State into another are within the prohibition to the States to levy taxes on "imports." (p. 139.)

He adds: "There is no attempt to discriminate injuriously "against the products of other States, and that the act in question is not, therefore, an attempt to fetter commerce among the "States." (p. 140.)

For these reasons the judgment of the Supreme Court was affirmed.

MR. JUSTICE NELSON dissented.

He referred to Brown *vs.* Maryland, and Almy *vs.* California, and said: "These cases have decided this question. The law in "question lays a duty on imports, and is repugnant to the clause "of the Constitution."

MINOT vs. PHILADELPHIA, WILMINGTON AND BALTIMORE RAILROAD COMPANY, (C. C. U. S. District of Delaware,) 3 Am. Law Times Reports, p. 193, (1870.)

A State law which levies a tax upon the locomotives of a railroad passing through the State is unconstitutional, and equity will enjoin its enforcement.

A tax upon stock and a tax upon net earnings of such a road sustained.

(Counsel.) No names of counsel reported.

(Statute reviewed.) The act under review was a law passed in 1869 by the State of Delaware, which imposed a tax of one-fourth of one per cent. of the actual cash value of every share of the capital stock of every railroad and canal company incorporated by the State and doing business therein.

The first section of the same act imposed another tax upon the same class of companies. It was a tax of three per centum upon the net earnings or income received during the preceding year.

The third section imposed still another tax. It enacted that every railroad company incorporated by the State, and *doing business therein*, should pay a tax of one hundred dollars *for the use, in the State*, of each locomotive belonging in whole or in part to the company, and twenty-five dollars for each passenger and ten dollars for each freight car used by said company within the State.

(History.) These taxes were charged to be illegal; that they were imposed in violation of the rights conferred upon the P., W. and B. R. R. Co., by its charter, and that they are forbidden by the Constitution of the United States.

The opinion of the Circuit Court of the United States District of Delaware was delivered by

MR. JUSTICE STRONG.

The learned judge, after referring to the several acts of Assem bly incorporating the Philadelphia, Wilmington and Baltimore railroad company, comes to the act of Assembly of State of Delaware of April 8, 1869, imposing a tax upon every railroad and canal company incorporated by or under any law of the State, of one-fourth of one per cent. (in addition to other taxes then imposed by law) on the actual cash value of every share of the capital stock. The first section of said act levies a tax of three per cent. upon the net earnings or income of any of said companies; and the third section of said act levies a further tax for the use, in the State of Delaware, of each locomotive, passenger car, freight car and truck belonging to said company.

He first disposes of an objection to the jurisdiction of the court, and treats, at great length, the question raised in connection with the taxation of the shares and that imposed upon the net earnings, and refuses to enjoin the collection of the same.

The question as to the legality of the tax on the locomotives, passenger cars, freight cars and trucks is the particular point treated upon in this case.

This, he says: "Is not a tax upon the property of a company "nor upon its franchises generally, but it seems to be rather a "license fee exacted for the privilege of using the rolling stock. "I have said that the franchises can be taxed as property, and "that the property acquired or held under it is taxable." (p. 196.)

He says: "It is admitted that the tax or license fee is laid upon "the use of locomotive, cars, &c., mainly employed in transporting passengers and property through the State from other States, "or into it or out of it, and it is, in my opinion, a regulation of "commerce between the States. It is a prescription that passengers and merchandise shall not be carried through the State "except upon certain conditions."

He says: "That the regulation of commerce was, by the earlier "decisions of the Supreme Court, exclusively vested in Congress, "and that no part of it can be exercised by a State, except the "power to regulate commerce completely internal—that is entirely within a State." (p. 197.)

He states, "that the Delaware statute does, indirectly, levy a "tax upon both persons and property for transit through the State,

" into it and out of it," and he therefore held that a State enactment which levies a tax upon the rolling stock of a railroad which passes through the State is unconstitutional, and equity will enjoin its enforcement. (p. 199.)

But he refused the injunction prayed for to prevent the payment and collection of the tax prescribed by the fifteenth section upon the cash value of every share of the capital stock, and the injunction against the collection and payment of the tax prescribed by the twentieth section upon net earnings or income of the company.

principle and [illegible]
mouth of [illegible]
which [illegible]
with [illegible]
But [illegible]
[illegible]

ANALYSIS

OF

Cases Cited by the Commonwealth.

M'ILVAINE vs. COXE'S LESSEE, 4 Cranch, 208, (1808.)

A State has the right to compel its inhabitants to become citizens thereof.

(Counsel.) Messrs. **DUPONCEAN** and **INGERSOLL** for M'ILVAINE.
Messrs. **RAWLE** and **TILGHMAN** for COXE'S LESSEE.

(History.) The question which arose in this case was in substance as follows: Whether a person born in the colony of New Jersey before the war with Great Britain, and who resided there until the year 1777, but who then joined the British army in Philadelphia, and afterwards went to England, where he resided, and who claimed to be a British subject, could take and hold lands in the State of New Jersey by descent from a citizen of the United States in 1802.

The opinion of the Court was delivered by

MR. JUSTICE CUSHING.

He held, that on the 4th of October, 1776, the State of New Jersey was completely a sovereign and independent State, and had a right to compel the inhabitants of the State to become citizens thereof.

He says: "This opinion is predicated upon a principle which is "believed to be undeniable, that the several States which compose "this Union, so far, at least, as regarded their municipal regulations, became entitled, from the time when they declared themselves independent, to all the rights and powers of sovereign "States, and that they did not derive them from concession by the "British King. The treaty of peace contains a recognition of their "independence, not a grant of it. From thence its results that the "laws of the several State governments were the laws of sovereign "States, and as such were obligatory upon the people of such State "from the time they were enacted. We do not mean to intimate "an opinion that even a law of a State, whose form of government "had been organized prior to the 4th of July, 1776, and which "passed prior to that period, would not have been obligatory." (pp. 211–212.)

For these reasons the judgment was affirmed, with costs.

M'CULLOUGH vs. MARYLAND, 4 Wheat., 316, (1819.)

A State law imposing a tax upon any of the constitutional means employed by the government of the United States to execute its constitutional power is unconstitutional and void.

(Counsel.) Messrs. WEBSTER and PINKNEY for M'Cullough.
Messrs. HOPKINSON, JONES and MARTIN, Attorney General, for Maryland.

(Statute reviewed.) The act under review was a law passed February 11, 1818, by the State of Maryland, entitled "An Act to impose a tax on all banks, or branches thereof, in the State of Maryland, not chartered by the Legislature."

On the 10th of April, 1816, Congress passed an act, entitled "An Act to incorporate the subscribers to the Bank of the United

States." The president, directors and company of the Bank of the United States organized themselves and went into operation in the city of Philadelphia, in pursuance of said act, and they established, in 1817, a branch of said bank, or an office of discount and deposit, in the city of Baltimore

(History.) An action of debt was brought against M'Cullough, the cashier of the said branch or office of discount and deposit, to recover certain penalties incurred under the act of the Legislature of Maryland.

It was contended that the statute of Maryland was repugnant to the Constitution of the United States and the law of Congress aforesaid.

The County Court of Baltimore county rendered judgment against M'Cullough, and the Court of Appeals of the State affirmed this judgment. The cause was taken by writ of error to the Supreme Court of the United States.

The opinion of the Court was delivered by

Mr. Chief Justice MARSHALL.

He held that Congress had the power to incorporate a bank.

The question was whether the State of Maryland may, without violating the Constitution, tax a branch of the bank incorporated by Congress.

He says: "That the power of taxation is one of vital import-"ance; that it is retained by the States; that it is not abridged "by the grant of a similar power to the government of the Union; "that it is to be concurrently exercised by the two governments, "are truths which have never been denied." (p 425.)

He says: "It is admitted that the power of taxing the people "and their property is essential to the very existence of govern-"ment, and may be legitimately exercised on the objects to which "it is applicable to the utmost extent to which the government may "choose to carry it The only security against the abuse of the "power is found in the structure of the government itself. The "Legislature acts upon its constituents." (p. 428.)

He says: "The people of the State, therefore, give to their gov-"ernment a right of taxing themselves and their property, and as "the exigencies of the government cannot be limited, they pre-"scribe no limits to the exercise of this right, resting confidently "on the interest of the legislator and on the influence of the constituents over their representatives to guard them against the "abuse. But the means employed by the government of the Union "have no such security, nor is the right of a State to tax them "sustained by the same theory." (p. 428.)

He says: "It may be objected to this definition, that the power "of taxation is not confined to the people and property of a State. "It may be exercised upon every object brought within its jurisdiction." (p. 429.)

"This is true, but to what source do we trace this right? It is "obvious that it is an incident of sovereignty, and is co-extensive "with that to which it is an incident. All subjects over which "the sovereign power of a State extends are objects of taxation, "but those over which it does not extend are upon the soundest "principles exempt from taxation." (p. 429.)

He says: "The sovereignty of a State extends to everything "which exists by its own authority, or is introduced by its permission, but does not extend to those means which are employed "by Congress to carry into execution powers conferred on that "body by the people of the United States." (p. 429.)

For these reasons the court were of opinion that the act imposing a tax on the Bank of the United States is unconstitutional and void.

He says: "This opinion does not deprive the State of any resources which they originally possessed. It does not extend to "a tax paid by the real property of the bank in common with "other real property within the State, nor to a tax imposed on the "interests which the citizens of Maryland may hold in this institution, in common with other property of the same description "throughout the State. But this is a tax on the operation of the "bank, and is consequently a tax on the operation of an instrument employed by the government of the Union to carry its "power into execution, and is therefore unconstitutional. (p. 437.

The judgment of the court below was reversed.

STURGES vs. CROWNINSHIELD, 4 Wheaton, 122, (1819.)

A State law impairing the obligations of contracts within the meaning of the Constitution of the United States is unconstitutional and void.

(Counsel.) Messrs. DAGGETT and HOPKINSON for STURGES.
Messrs. HUNTER and OGDEN for CROWNINSHIELD.

(Statute reviewed.) The statute under review was a law passed in 1811 by New York, entitled "An Act for the benefit of insolvent debtors and their creditors." This act not only liberated the person of the debtor, but discharged him from all liability for any debt contracted previous to his discharge, on his surrendering his property in the manner it prescribes.

(History.) Crowninshield was the maker of two promissory notes, both dated at New York, on the 22d of March, 1811, for the sum of $771 86, and payable to the plaintiff, one on the 1st of August and the other on the 15th of August, 1811.

An action of assumpsit was brought against him in the Circuit Court of Massachusetts as the maker of these notes. He pleaded his discharge under the act of April 3, 1811

The following questions arose, to wit:

1. Whether the power to pass a bankrupt law is not exclusively vested in the Congress of the United States.

2. Whether the act of New York, passed April 3, 1811, is a bankrupt act within the meaning of the Constitution of the United States.

3. Whether the act aforesaid is an act impairing the obligation of contracts within the meaning of the Constitution of the United States.

The judges of the Circuit Court were divided in opinion upon these questions, and they were certified to the United States Supreme Court for their final decision, on motion of plaintiff's counsel

The opinion of the Court was delivered by

MR. CHIEF JUSTICE MARSHALL.

He held, that since the adoption of the Constitution of the United States, a State has authority to pass a bankrupt law, provided it does not impair the obligations of contracts or conflict with any act of Congress on the subject.

He says: "When the American people created a national "legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the States. "These powers proceed, not from the people of America, but from "the people of the several States, and remain after the adoption "of the Constitution what they were before, except so far as they "may be abridged by that instrument." (p. 193.)

"In some instances, as in making treaties, we find an express "prohibition, and this shows the sense of the Convention to have "been, that the mere grant of a power to Congress did not imply "a prohibition on the States to exercise the same power," (p. 193,) (except where, from its nature, it must be exclusive.)

"If the right of the States to pass a bankrupt law is not taken "away by the mere grant of that power to Congress, it cannot be "extinguished; it can only be suspended by the enactment of a "general bankrupt law." (p. 196.)

"It is sufficient to say, that until the power to pass uniform "laws on the subject of bankruptcies be exercised by Congress, "the States are not forbidden to pass a bankrupt law, provided it "contains no principle which violates the tenth section of the first "article of the Constitution of the United States." (p. 197.)

"Although, then, the States may, until that power shall be exercised by Congress, pass laws concerning bankrupts, yet they "cannot constitutionally introduce into such laws a clause which "discharges the obligations the bankrupt has entered into." (p. 199.)

For the reason that the act in question is a law impairing the obligations of contracts within the meaning of the Constitution of the United States, it is declared void, and the case is directed to be certified to the Circuit Court.

BIDDLE vs. THE COMMONWEALTH, 13 S. & R., 405 (1825.)

A State law imposing a tax on the vendors of foreign merchandise is constitutional.

(Counsel.) Messrs. BIDDLE and INGERSOLL for BIDDLE.

(Statute reviewed.) The statute under review was a law passed in 1821, and a supplement thereto passed in 1824, by Pennsylvania. By the first act every person dealing in the sale of any goods, wares or merchandise, wines or distilled liquors, except such as are the growth, produce or manufacture of the United States, (excepting sales made by auctioneers appointed by law, and by licensed tavern keepers,) were required to take out a license for vending such foreign merchandise or liquors, for which licenses certain duties were to be paid, under a penalty of fifty dollars. There was an exception also in favor of importers of foreign goods.

The supplement abolished the distinction between the importer and other sellers of foreign goods, &c., and took away the penalty of fifty dollars, and substituted an action before an alderman or justice for the amount of the duty payable by the license, with the addition of ten per cent. thereon.

(History.) The Commonwealth brought suit against Biddle for the sum of eleven dollars before an alderman, who rendered judgment for the Commonwealth. It was contended that the acts above mentioned were unconstitutional and void.

An appeal was taken to the Court of Common Pleas, where judgment was again rendered in favor of the Commonwealth; and the case was then carried to the Supreme Court of the State.

The opinion of the Court was delivered by

MR. CHIEF JUSTICE TILGHMAN.

He says: "The right of laying excises is given to Congress, but "the States possess the same power because they had it origi-"nally, and are not prohibited from exercising it by the Consti-

"tution. But the prohibition must not be carried beyond the "plain meaning of the words. It is necessary that the States "should have a revenue of their own. All objects, therefore, "within their boundaries are subject to their taxation, unless "plainly exempted by the Constitution." (p. 409.)

He answers the point, "that this duty interferes with the right "of Congress to raise a revenue from duties on imports, because "the increase produces a decrease of consumption, in consequence "of which future imports will be lessened, and thus the revenue "diminished. That by the same reasoning the State may be "argued out of all right of taxation, because the power of Con"gress to lay taxes is general; and on whatever objects the State "lays a tax, it may be said to interfere with the right of Congress. "For instance, Congress once laid a tax on carriages, and Penn"sylvania did the same; and no doubt many people who would "have been able and willing to pay one of the taxes laid on "their carriages, rather than be burdened with both, and thus the "revenue of the United States was diminished. Nevertheless, "no lawyer ever questioned the legality of the tax." (p. 410.)

For these reasons he was of the opinion that the acts of Assembly were constitutional. Judgment affirmed.

HOUSTON vs. MOORE, 5 Wheaton, 1, (1829.)

A State law imposing a penalty on officers and privates of the State militia who refuse or neglect to serve, when called into actual service, in pursuance of an order of the President, is constitutional.

(Counsel.) Mr. HOPKINS for HOUSTON.
Mr. C. J. INGERSOLL and ROGERS for MOORE.

(Statute reviewed.) The statute under review was a law passed in 1814 by Pennsylvania, which provided that the officers and privates of the militia of the State, neglecting or refusing to serve when called into actual service by the President of the United States, shall be liable to the penalties defined in the act of Congress of the 28th of February, 1795, or to any penalty prescribed since the date of that act, or which may hereafter be prescribed by any law of the United States, and also providing for the trial of such delinquents by a State court martial, &c.

(History.) Houston was a private enrolled in the Pennsylvania militia, and belonging to a detachment of the militia ordered out by the Governor of the State, in pursuance of a requisition from the President of the United States, dated July 4, 1814. Being duly notified and called upon, he neglected to march with the detachment. He was tried for this delinquency before a court martial, and was sentenced to pay a fine, for the levying of which on his property he brought an action of trespass in the State Court of Common Pleas against the Marshall by whom it was levied.

He contended that the act of Pennsylvania was contrary to the Constitution of the United States and the laws of Congress. A verdict and judgment was rendered for Moore, the defendant, which judgment being carried to the Supreme Court of the State was affirmed.

The opinion of the Court was delivered by

MR. JUSTICE WASHINGTON.

He says: "There is but one question in this cause, and it is whether the act of the Legislature is repugnant to the Constitution of the United States."

He held that the grant of power to the Federal Government to provide for organizing and disciplining the militia did not preclude the States from legislating on the same question, provided the law of the State was not repugnant to the law of Congress.

He says: "It follows, as I conceive, that jurisdiction over this "offence remains to be concurrently exercised by the National "and State court martial, since it is authorized by the laws of "the State, and not prohibited by those of the United States." (p. 29.)

For these reasons he was of the opinion that the State court martial had a concurrent jurisdiction with the tribunal pointed out by the acts of Congress, and the judgment was therefore affirmed.

THE PEOPLE vs. BABCOCK, 11 Wendell, 586, (1834.)

A State law regulating ferries within its limits is Constitutional.

(Counsel.) J. C. SPENCER for THE PEOPLE.
J. A. SPENCER for BABCOCK.

(Statute reviewed.) The statute under review was a law passed by New York, which enacted that if any person, except within certain counties, in the enumeration of which Niagara is not included, shall use any ferry for transporting across any river, stream or lake, any person or any goods, chattels or effects, for profit or hire, unless authorized in the manner specified, shall be considered guilty of a misdemeanor, and on conviction should be subject to a fine, &c.

(History.) Babcock was arrested for having violated the above statute, he having transported across the Niagara river, from Youngstown, in the county of Niagara, persons and goods, for profit and hire, without having obtained a license as prescribed by law. He refused to give bail for his appearance, and was committed to jail in the county of Niagara. He thereupon applied for a *habeas corpus*, and he was brought before the commissioner, who allowed the same. He proved that be uniformly reported his arrivals on the New York side of the river to a deputy collector of the customs residing at Youngstown, and had caused the boat to be registered at Lewiston, and produced a register granted to him on the 31st May, 1831. Upon this proof the commissioner made an order discharging Babcock from confinement and setting him at large.

A writ of *certiorari* was sued out, directed to the commissioner, by virtue whereof the proceedings had before the commissioner were brought before the Supreme Court of the State.

The opinion of the Court was delivered by

MR. JUSTICE NELSON.

He held, that the State had power to regulate its ferries upon the waters within her limits.

He says: "I understand the case of Gibbons *vs.* Ogden, 9 "Wheaton, 1, distinctly to concede that this power, which belongs "to the sovereignty of a State and is essential to the regulation "of its internal police, has not been surrendered to the National "Government, and that the clause in the Constitution to regulate "commerce, &c., does not include it." (p. 591.)

"That the State has the power to establish and regulate ferries "is indisputable, unless it has been conferred on the National "government by some clause in the Constitution; that it has "been so conferred has not been claimed by that government, "and, on the contrary, it has been expressly disclaimed by the "judicial department thereof." (p. 591.)

For these reasons the court was of the opinion that the commissioner erred in discharging the defendant.

KELLOGG vs. THE UNION COMPANY, 12 Conn., 7, (1837.)

A State law authorizing a company to improve the navigation of a river, and to collect tolls for every vessel passing up or down, is constitutional.

(Counsel.) Messrs. SHERMAN and BETTS for KELLOGG.
Messrs. HUNGERFORD and ELLSWORTH for UNION COMPANY.

(Statute reviewed.) The act under review was a law passed in October, 1800, by Connecticut, incorporating the Union company. By the fifth section of the act the company was authorized to dig, cleanse and remove obstructions from the channel and bars of the Connecticut river, &c. The sixth section authorized the company, after having removed the obstructions from the river, &c., to demand and receive from the owner and master of each and every vessel passing up or down said river certain tolls

(History.) An action of debt was brought by the Union company against Samuel and William Kellogg, to recover of them, as owners of the brig Alexander, the toll authorized by the charter of the company. They contended that the act was a regulation of commerce, and therefore unconstitutional.

The Court below gave judgment for the company, and the case was taken to the Supreme Court of Errors of the State.

The opinion of the Court was delivered by

Mr. Justice BISSELL.

He held that the State had power to improve the navigation of a navigable river within its limits, between a port of entry and delivery established by a law of Congress, and to provide for the expense of such improvement by tolls on a description of vessels thus enabled to pass up and down the river which, without such improvement, could not ordinarily pass, and that the law does not conflict with the power of Congress to regulate commerce.

He says: "It is conceded that the Constitution gives to Con- "gress the exclusive power to regulate commerce with foreign na- "tions and between the States. It is also conceded that this "clause in the Constitution does not of itself divest the States of "their jurisdiction over the navigable waters within their territo- "rial limits, but that their control over them remains the same as "before the adoption of the Constitution, until Congress does, in "fact, legislate regarding them." (p. 20.)

He says: "For although enactments of the State may inciden- "tally affect commerce, yet they are not a regulation of com- "merce, nor are they adopted by the States of any supposed "power to regulate commerce. They are mere municipal regula- "tions." (p. 23.)

He says: "All our turnpike roads, toll bridges, canals, ferries, "and the like, more or less concern commerce or the intercourse "between the different parts of the State. The truth, however, "is that none of them relate to commerce within the sense and "meaning of the term as used in the Constitution. They are "mere municipal regulations, with which Congress has no con- "cern." (p. 24.)

For these reasons the judgment of the Court was affirmed.

BRISCOE vs. THE BANK OF KENTUCKY, 11 Peters, 257, (1837.)

A State cannot emit bills of credit, but it may grant acts of incorporation for the attainments of these objects which are essential to the interests of society.

(Counsel.) Messrs. WHITE and SOUTHARD for BRISCOE.
Messrs. HARDIN and CLAY for BANK.

(Statute reviewed.) The act under review was a law passed the 20th of November, 1820, by Kentucky, establishing a bank by the name of "The Bank of the Commonwealth of Kentucky." The act declares the bank shall be established "in the name and behalf of the Commonwealth of Kentucky," under the direction of a president and twelve directors chosen by the Legislature. That it shall be a corporation capable of suing and being sued, and of purchasing and selling every description of property. That the bank shall be exclusively the property of the Commonwealth. The act authorized the issuing of notes, &c.

(History.) The bank instituted a suit against Briscoe on a promissory note, for which the notes of the bank had been given as a loan, to the drawers of the note. It was claimed that the note given was void, as the same was given for the notes of the bank, which were "bills of credit" issued by the State of Kentucky, against the provisions of the Constitution of the United States, which prohibits the issuing of bills of credit by the States, and that the act establishing the bank was unconstitutional and void.

The Mercer County Circuit Court rendered judgment for the bank, and the judgment was affirmed by the Court of Appeals. The case was brought before the Supreme Court of the United States by writ of error.

The opinion of the Court was delivered by

MR. JUSTICE M'LEAN.

He held, that the notes issued by the bank were not bills of credit within the meaning of the Federal Constitution, and that the act incorporating the bank was a constitutional exercise of power by the State.

He says: "*The Federal Government is one of delegated powers.* "*All powers not delegated to it, or inhibited to the States, are reserved* "*to the States or to the people.*" (p. 317.)

For these reasons the judgment of the Supreme Court was affirmed.

MR. JUSTICE STORY dissented,

On the ground that the notes were bills of credit, and under the Constitution of the United States no State could emit bills of credit.

GROVES, ET. AL., vs. SLAUGHTER, 15 Peters, 449, (1841.)

A State law forbidding the importation of slaves from any other State is constitutional.

(Counsel.) Messrs. GILPIN and WALKER for GROVES, ET. AL.
Messrs JONES, CLAY and WEBSTER for SLAUGHTER.

(History.) An Action was instituted in the Circuit Court of Louisiana by Slaughter, on a promissory note, given in the State of Mississippi, for the purchase of slaves in that State. The slaves had been imported in 1835–6, as merchandise, or for sale, into Mississippi, by Slaughter, a non-resident of that State. The Constitution of Mississippi, adopted on the 26th October, 1832, declared that the introduction of slaves into that State as merchandise, or for sale, should be prohibited from and after the first day of May, 1833. Groves and others, parties to the note, contended that the contract was void, asserting that it was made in violation of the provision of the Constitution of Mississippi, which, it was insisted, was operative after May 1, 1833, without legislative enactment to carry the same into effect.

Slaughter contended that the Constitution of the State was repugnant to the Constitution of the United States, which declares that Congress shall have power to regulate commerce between the States, &c. The Circuit Court decided that the notes were a valid consideration, upon which Slaughter could recover. The case was carried to the Supreme Court of the United States.

The opinion of the Supreme Court of the United States was delivered by

MR. JUSTICE THOMPSON.

The question in this case was the constitutionality of an act forbidding the importation of slaves from any State into Mississippi, and the act was sustained.

He held, that it was intended as a local police measure, and while it might affect inter-State commerce, still it was primarily an exercise of a right conceded to the State.

MR. JUSTICE M'LEAN said:

"It is admitted that the power of taxation is common to the "State and Federal Governments, but this is not in its nature or "effect a repugnant power, and its exercise is vital to both gov-"ernments." (p. 505.)

MR. CHIEF JUSTICE TANEY said:

"But the question upon which different opinions have been en-"tertained is this: Would a regulation of commerce by a State "be valid until Congress should otherwise direct, provided such "regulation was consistent with the regulations of Congress, and "did not in any manner conflict with them?" (p. 509.)

He says: "No case has yet arisen which made it necessary, in "the judgment of the court, to decide this question." (p. 509.)

For these reasons the judgment of the Circuit Court was affirmed.

MR. JUSTICE STORY, MR. JUSTICE THOMPSON, MR. JUSTICE WAYNE and MR. JUSTICE M'KINLEY concurred with the majority of the court in opinion that the provisions of the Constitution of the United States, which gives the regulation of commerce to Congress, did not interfere with the provisions of the Constitution of the State of Mississippi, which relates to the introduction of slaves as merchandise or for sale.

MR. JUSTICE **BALDWIN** dissented.

THE THAMES BANK vs. LOVELL, 18 Conn., 500, (1847.)

A State law imposing reasonable tolls for improving the navigation of a river within its own border is not a regulation of commerce or a duty on tonnage, and is therefore constitutional and valid.

(Counsel.) Mr. STRONG for THAMES BANK.
Messrs. STAPLES and FOSTER for LOVELL.

(Statute reviewed.) The act under review was a law passed in May, 1805, by Connecticut, incorporating the Norwich Channel company, for the purpose of deepening and improving the channel of the river Thames, and facilitating the navigation of the same.

By subsequent enactments this company was fully authorized and empowered, whenever they should have deepened the channel of said river and removed the obstructions to the navigation thereof, so that vessels drawing seven and one-half feet of water might pass through said channel, to demand and receive from every vessel passing up or down in said channel certain tolls.

In 1825 the Thames Bank was duly organized under its charter, and immediately thereupon the directors of said bank purchased and caused to be transferred to said bank all the shares of stock in the Norwich Channel company, and have ever since been entitled to all the rights, privileges, franchises, immunities and powers of said company. All things were done which by said acts of incorporation were required of them in succeeding to the rights and duties of said Channel company.

(History.) An action of debt was brought by said bank before a justice of the peace to recover of Lovell the sum of five dollars and fifty cents, for the passing of a schooner through the channel of the river Thames.

He contended that the act was a regulation of commerce, and therefore unconstitutional.

Judgment was rendered in favor of Lovell, and the case was thereupon taken on writ of error to the Superior Court, which was reserved for the advice of the Supreme Court of Errors.

The opinion of the Court was delivered by

MR. CHIEF JUSTICE CHURCH.

He held, that a State law imposing reasonable tolls on vessels or freight as compensation for improving the navigation of a river within its own borders is constitutional and valid, unless it conflicts with the powers of Congress in actual use.

He says: "The tolls alone are the subject of complaint. But "these are only the fair equivalent for privileges, which the State "had a right to create, and without which these privileges could "never have existed. Commerce, therefore, has not been crippled "by the tolls, as the defendant claims, but has been extended by "them." (p. 511.)

He adds: "But we think that this toll is not in the nature "of a tonnage duty or any duty at all upon the vessel, within the "meaning of the Constitution, any more than a toll at a turnpike "gate is a duty upon the carriage; it is a compensation exacted "for a privilege conferred, and in proportion to it. It is no more "a tonnage duty than laws regulating wharfage or port charges." (p. 512.)

For these reasons the judgment of the justice of the peace is declared erroneous and reversed.

SMITH vs. MARSTON, 5 Texas, 426, (1849.)

A city ordinance imposed a tax on every passenger arriving at its port; to recover the tax, suit should be brought in the name of the city.

The decisions in Norris vs. City of Boston, and Smith vs. Turner, held not to be conclusive authority against the power of the States to impose certain regulations, &c., upon the introduction of passengers.

(Counsel.) Mr. MERRIMAN for SMITH.

No counsel named for MARSTON.

By an ordinance of the mayor and aldermen of the city of Galveston, it was ordained that all masters, owners or clerks of any ship, steamboat or other vessel arriving at the port of Galveston from any port beyond the limits of the State of Texas, should, within twenty-four hours after the arrival of such ship, steamboat or other vessel, pay to the city collector the sum of one dollar for each and every cabin, steerage or deck passenger over the age of fifteen years.

It was further ordained that the master, owner or clerk of any ship, steamboat or other vessel arriving in that port from any port beyond the limits of the State of Texas, should, within twenty-four hours after such arrival, deposit in the mayor's office a true list, verified under oath, of all passengers arriving on board of such ship, steam or other vessel. For a refusal or neglect to comply with the provisions of this ordinance, a fine was imposed.

(History.) Smith was the captain of a vessel which arrived at Galveston from New Orleans. He failed and refused to furnish said list as required, or to pay the tax of one dollar per passenger.

An action was brought against him to recover the tax and the fine. He contended that the provisions of the ordinance were in conflict with the Constitution of the United States.

The justice of the peace rendered judgment against him, and he appealed to the District Court. This court also gave judgment against him, and the case was then carried to the Supreme Court of the State.

The opinion of the Court was delivered by

Mr. Justice LIPSCOMB.

He held: "That the demurrer to the parties was well taken and "ought to have been sustained, and for this reason we would re-"verse the case, but from the fact that it is an appeal from a jus-"tice of the peace, and we have held in the case of Titus vs Lati-"mer, at this term, that an appeal will not lie from a justice of "the peace to the District Court under our Constitution. All "that we can do is to dismiss the case from court."

He says: "That the decisions of the Supreme Court of the "United States in the two cases of Smith vs. Turner, and Norris "vs. the city of Boston, would seem to go the whole length of "taking from the States the right to pass such laws, and to declare "that when so passed they are unconstitutional. That court being "the tribunal of the last resort on such questions, its decisions, "for the time, will perhaps command submission. It is not, how-"ever, likely when so decided by a divided court, with a majority "of only one, and the great weight of judicial learning against "it, that it will receive the general approbation of either the bar "or the bench. By many it will be regarded as a most dangerous "and an alarming encroachment upon the constitutional rights "of the States." (pp. 431 and 439.)

The judgment of the court below was reversed and dismissed.

NATHAN vs. LOUISIANA, 8 Howard, 73, (1850.)

A State law imposing a tax upon all money or exchange brokers is constitutional.

A State has a right to tax its own citizens for the prosecution of any particular business or professsion within the State.

(Counsel.) Mr. WILDE for NATHAN.
Mr. COXE for LOUISIANA.

(Statute reviewed.) By an act of the Legislature of Louisiana of the 26th of March, 1842, entitled "An Act relative to the revenue of the State," it is provided in the ninth section that "each and every money or exchange broker shall hereafter pay an annual tax of $250 to the State in lieu of the tax heretofore imposed on them." (History.) Nathan having failed to pay the tax for two years, a suit was brought against him in the District Court of the State, in which a judgment for five hundred dollars was rendered. That judgment on appeal to the Supreme Court of the State was affirmed. The defence made by Nathan was that his sole business was that of buying and selling foreign bills of exchange, which are instruments of commerce, and that the tax is repugnant to the Constitution of the United States, which declares that Congress shall have power "to regulate commerce with foreign nations and among the several States."

The case was carried to the Supreme Court of the United States. *The opinion of the Court was delivered by*

MR. JUSTICE M'LEAN.

He says: "This is not a tax on bills of exchange. Under the "law every person is free to buy or sell bills of exchange as may "be necessary in his business transactions, but he is required to "pay the tax if he engage in the business of a money or an ex-"change broker." (p. 80.)

He says: "The right of a State to tax its own citizens for the "prosecution of any particular business or profession within the "State has not been doubted." (p. 80.)

He asks: "Is a tax upon a ship, as property which is admitted "to be an instrument of commerce, prohibited to a State?" * * There can be but one answer to this question: "No one can claim "an exemption from a general tax on his business within the "State, on the ground that the products sold may be used in "commerce." (pp. 80 and 81.)

He says: "*The taxing power of a State is one of its attributes of* "*sovereignty, and where there has been no compact with the Federal* "*Government or cession of jurisdiction for the purpose specified in* "*the Constitution, this power reaches all the property and business* "*within the State, which are not properly denominated the means of* "*the General Government*, and as laid down by this court, it may "be exercised at the discretion of the States. *If this power of* "*taxation by a State within its jurisdiction may be restricted beyond* "*the limitations stated, on the ground that the tax may have some* "*indirect bearing on foreign commerce, the resources of a State may* "*be thereby essentially impaired. But State power does not rest on* "*a basis so undefinable.* Whatever exists within its territorial "limits, in the form of property real or personal, with the exceptions stated, is subject to its laws, *and also the numberless enterprises in which its citizens may be engaged.* These are subjects "of State regulation and State taxation, and there is no Federal "power under the Constitution which can impair this exercise of "State sovereignty." (pp. 82 and 83.)

For these reasons the tax in question was declared not repugnant to any power of the Federal Government, and the judgment of the Supreme Court of the State was affirmed.

VEAZIE, ET AL., vs. MOOR, 14 Howard, 568, (1852.)

A State law granting the exclusive navigation of a river to a company who was to improve it is constitutional.

(Counsel.) Mr. PAINE for VEAZIE, ET. AL.
Messrs. KELLY and MOOR for MOOR.

(Statute reviewed.) The act under review was a law passed July 30, 1846, by the Legislature of Maine, which enacted that William Moor and Daniel Moor, Jr., their associates and assigns, were authorized to improve the navigation of the Penobscot river above Old Town, &c.

The act provides, also, that if said William Moor and Daniel Moor, their associates and assigns, perform the conditions of the act, the sole right of navigating said river by boats propelled by steam, from Old Town, so far up as they shall render the same navigable, should be granted to them for the term of twenty years from and after the completion of the improvement as provided in the act.

(History.) The improvements to the navigation of the river were completed as required, and a steamer was placed on the river by Moor, which ran between Old Town to Nickaton. Subsequently other steamers were placed on the river by him.

Veazie, in conjunction with others, placed a steamboat on the river and ran her between Old Town and Piscataquis Falls, until they were arrested by an injunction, granted at the suit of Moor.

They contended that the act was a regulation of commerce, and therefore unconstitutional.

The Supreme Judicial Court of the State perpetually enjoined Veazie from running any steamboat on said river or any part thereof above Old Town, without having obtained the consent of Moor, according to law, or until Moor's exclusive right should expire. The court decreed to Moor the sum of $1,052 45 for damages and expenses incurred by him, by reason of the interference with his rights by Veazie and others.

The case was taken on writ of error to the Supreme Court of the United States.

The opinion of the Court was delivered by

MR. JUSTICE DANIEL.

He held, that the State had the power to grant the exclusive navigation of the upper river to a company who was to improve it.

He says: "Commerce with foreign nations must signify commerce which in some sense is necessarily connected with these "nations; transactions which either immediately or at some stage "of their progress must be extra-territorial. The phrase can never "be applied to transactions wholly internal, between citizens of "the same community, or to a polity and laws whose ends and "purposes and operations are restricted to the territory and soil "and jurisdiction of such community. Nor can it be properly "concluded that because the products of domestic enterprise in "agriculture or manufactures, or in the arts, may ultimately become the subjects of foreign commerce, that the control of the "means or the encouragements by which enterprise is fostered "and protected is legitimately within the import of the phrase "foreign commerce, or fairly implied in any investiture of the "power to regulate such commerce. A pretension as far-reaching "as this would extend to contracts between citizen and citizen of "the same State; would control the pursuit of the planter, the "grazier, the manufacturer, the mechanic, the immense operation "of the collieries and mines and furnaces of the country, for there "is not one of these avocations, the result of which may not become the subjects of foreign commerce, and be borne, either by "turnpikes, canals or railroads, from point to point within the "several States, towards an ultimate destination like the one above "mentioned. Such a pretension would effectually prevent or "paralyze every effort at internal improvement by the several "States, for it cannot be supposed that the States would exhaust "their capital and their credit in the construction of turnpikes, "canals and railroads, the remuneration derived from which and "all control over which might be immediately wrested from them, "because such public works would be facilities for a commerce "which, whilst availing itself of those facilities, was unquestion-

"ably internal, although intermediately or ultimately it might "become foreign." (pp. 573–4.)

For these reasons the judgment of the Supreme Court of the State was affirmed.

OHIO LIFE INSURANCE AND TRUST COMPANY vs. DEBOLT, 16 How., 416, (1853.)

A State law imposing a tax on a bank is constitutional, where the Legislature has not expressly bound the State by contract.

(Counsel.) Messrs WORTHINGTON and STANBERRY for COMPANY.

Messrs. SPALDING and PUGH for DEBOLT.

(Statute reviewed.) The act under review was a law passed in 1851 by Ohio, entitled "An Act to tax banks and bank and other stocks the same as other property."

(History.) The Ohio Life insurance and trust company was made subject to the provisions of this act by the third section of the same.

It resisted the payment of the tax upon the ground that by the act of Ohio of 1845 it was provided that each banking company should pay, annually, six per cent. upon its profits in lieu of all taxes to which such company or the stockholders thereof, on account of stocks owned therein, would otherwise be subject.

It was contended that the act of 1851 impaired the obligation of contracts, and was therefore repugnant to the Constitution of the United States.

Suit was brought for the collection of the tax, and upon final hearing of the parties the Supreme Court of the State decided in favor of the State, and directed the tax to be paid, together with the penalty which the law inflicted for its detention. The case was carried to the Supreme Court of the United States.

The opinion of the Court was delivered by

MR. CHIEF JUSTICE TANEY.

The question in this was whether the State had relinquished its right of taxation to a certain extent in its charter to a bank.

He held that the Legislature might bind the State by a contract, but that in this case the Legislature had not bound the State.

He says: "It will be admitted on all hands that, with the ex- "ception of the powers surrendered by the Constitution of the "United States, the people of the several States are absolutely "and unconditionally sovereign within their respective territories. "It follows that they may impose what taxes they think proper "upon persons or things within their dominion, and may appor- "tion them according to their discretion and judgment. They "may, if they deem it advisable to do so, exempt certain descrip- "tions of property from taxation and lay the burden of support "ing the government elsewhere. And they may do this in the "ordinary forms of legislation or by contract, as may seem best "to the people of the State. There is nothing in the Constitution "of the United States to forbid it, nor any authority given to this "court to question the right of a State to bind itself by such con- "tracts when it may think proper to make them." (p. 428.)

He says: "The grants of privileges and exemptions to a cor- "poration are strictly construed against the corporation and in "favor of the public. Nothing passes but what is granted in clear "and explicit terms, and neither the right of taxation, nor any "other power of sovereignty which the community have an interest "in preserving, undiminished, will be held by this court to be sur- "rendered, unless the intention to surrender is manifested by "words too plain to be mistaken." (p. 435.) Vide Billings vs. the Providence Bank.

For these reasons the act does not impair the obligation of any contract with the plaintiff in error, and the judgment of the Supreme Court ought to be affirmed.

Mr. Justice Catron, Mr. Justice Daniel, Mr. Justice Campbell and Mr. Justice M'Lean concurred with the above opinion, but for different reasons that the Legislature could not bind the State by a contract that could not be resumed and exercised by a future Legislature. (p. 441.)

Mr. Justice Wayne, Mr. Justice Curtis and Mr. Justice Nelson dissent, for the reason "that the State had made a contract with "the corporation that the rate of taxation of this company should "not at any time be higher than the rate of taxation actually and "legitimately imposed on banking institutions; that this contract "is not complied with by passing an act to tax banks which could "not and did not operate to tax the banking institutions of the "State."

FREEHOLDERS vs. THE STATE, 4 Zabriskie, 718, (1853.)

A State law authorizing the appointment of a board of freeholders to fix the rates of ferries is constitutional.

(Counsel.) Messrs. ZABRISKIE and DAYTON for FREEHOLDERS.
Messrs. WHITEHEAD and SCUDDER for the STATE.

(Statute reviewed.) The act under review was a law passed in 1799 by New Jersey which enacted that a board of chosen freeholders should fix the rates to be taken at the several ferries within their respective counties, &c.

(History.) By an ordinance of a board of chosen freeholders the rates of ferriage were fixed over the ferry from Jersey City to New York, known as the Jersey City ferry. It was contended that the act only authorized the freeholders to fix the rates to be taken at the ferries within their county, and did not apply to a ferry across a river into another county, much less into another State.

The Supreme Court of the State affirmed the proceedings of the freeholders and the case was carried to the Court of Errors and Appeals.

The opinion of the Court was delivered by

MR. JUSTICE ELMER.

He held that the regulation of tolls on bridges and turnpike roads, and fares on railroads and ferries which are used for communication and commerce between the States, is part of the powers reserved to the State, and is not delegated to the General Government.

He refers to Charles River Bridge *vs.* Warren Bridge, 11 Peters, 420, which "establishes the doctrine that grants by the Legisla- "ture are to be construed strictly, and that it is not to be inferred "from the granting of a charter of incorporation which contains no "stipulation against applying the general powers of the govern- "ment to the business of such corporation, that such powers cannot "be exercised, even although the effect of exercising them may be "to destroy or render of no value the charter itself." (p. 728.)

He says: "But it was insisted also that the ferry in question, "as now used, is a part of the means of carrying on commerce "between two States of the Union, and that a regulation of the "rates of fare for carrying passengers and goods, is, in effect, a "regulation of commerce, which belongs exclusively to Congress. "The same objection was made in the case of the People *vs.* Bab- "cock, and I entirely agree with the Supreme Court of New York, "in holding it to be of no force. Whether the power of regulat- "ing commerce between the States is to be considered as vested "exclusively in Congress, so that the Legislature of the several "States cannot constitutionally pass any law on the subject, al- "though it may not conflict with any existing laws of the United "States has not yet been decided by the Supreme Court of the "United States. But conceding it to be so, the regulation of the "tolls of bridges and turnpike roads, and the fares of railroads "and ferries, is in no just sense a regulation of commerce, and "has never been so regarded. It is a part of that general power "of police, essential to every State, and which could not be with "safety and has not been surrendered to the General Govern- "ment." (p. 728.)

He quotes from Justice M'Lean's opinion in Smith *vs.* Turner, 7 Howard, 393, in which he says: "A State cannot regulate commerce, but it may do many things which would more or less "affect it. It may tax a ship or other vessel used in commerce "the same as other property owned by its citizens. A State may "tax the stages in which the mail is transported, but this does "not regulate commerce." (p. 729.)

He says: "A large part of the commerce between Philadelphia "and New York passes by means of the roads and canals through "New Jersey, which latter State has always regulated the tolls "without question."

For these reasons the judgment of the Supreme Court was unanimously affirmed.

PADELFORD, FAY & CO. vs. SAVANNAH, 14 Georgia, 438, (1854.)

An ordinance imposing a tax upon the gross amount of sales of all negroes, goods, wares and merchandise sold within the corporate limits of the city is constitutional.

(Counsel.) Messrs. LAW and BARTON for PADELFORD & CO.
Mr. GRIFFIN for SAVANNAH.

The city council of Savannah passed the following ordinance:

"*And be it further ordained,* That on the gross amount of sales of all negroes, goods, wares and merchandise, or other commodity, article or thing sold within the corporate limits of the city of Savannah, by any person or persons whomsoever, upon or for a commission, premium, percentage or other profit charged or to be charged thereon, or on joint account, and when not included in the returns as stock in trade, and whether for cash or credit,

* * there shall be paid by the person so selling, whether commission merchant, trader or agent, of any nature or kind whatever, fifty cents on every hundred dollars of the amount of such sales respectively."

(History.) Padelford, Fay & Co., commission merchants, refused to pay the tax upon the goods and merchandise imported into the State and sold by them in the original casks and packages, upon commission, upon the ground that the laying of this tax was a violation of the Constitution of the United States.

Upon *certiorari* before Judge Fleming at Chambers, this objection was overruled, and his decision was assigned as error to the Supreme Court of the State.

The opinion of the Supreme Court of the State was delivered by

MR. JUSTICE BENNING.

He held, that the case of Brown *vs.* Maryland, 12 Wheat., is overruled by the License cases, in 5 Howard, by the Passenger cases, in 7 Howard, and partly by the case of Groves, *et al.*, *vs.* Slaughter, 12 Pet.

He says: "Indeed, if the ordinance violates the provision in "the Constitution as to the regulation of commerce, it is not very "easy to see what is left to a State to tax. It can lay no tax that "will not more or less affect commerce; more or less prevent "consumption, and without consumption there can be no commerce." (p. 442.)

"It is not said, in Brown *vs.* Maryland, that the State must "discriminate in favor of the foreigner and not tax him, when "she taxes her own citizens. Now what was the object of this "prohibition? In a word, was it the object to put foreigners in a "better condition than natives? We know that the object was "not to put citizens of another State in that better condition." (p. 444.)

He refers to the speeches made by the different makers of the Constitution, and says: "That the makers of the Constitution "understood that it delegated to the General Government, or any "department thereof, no power by implication, but only delegated "such powers as it expressly enumerated." (p. 495.)

That it delegated no exclusive power, unless the delegation was said to be exclusive. (p. 495.)

That it laid no prohibition upon the States, except such as it specified. (p. 496.)

"The power to regulate commerce given to Congress is not said "to be exclusive; therefore it is not exclusive. The States and "Congress have it concurrently." (p. 514.)

For these reasons the ordinance in question is not unconstitutional, and the judgment of the court below was affirmed.

COMMONWEALTH vs. THE NEW BEDFORD BRIDGE COMPANY, 2 Gray, 339, (1854.)

A State law authorizing the building of a toll bridge over navigable water is not unconstitutional as interfering with the power to regulate commerce granted to Congress by the Constitution.

(Counsel.) F. J. COFFIN for the COMMONWEALTH.
F. D. ELLIOTT for the BRIDGE COMPANY.

(Statute reviewed.) The act under review was a law passed by Massachusetts authorizing the erection of a bridge over the Acushnet river, a navigable stream.

(History.) The bridge was erected by the New Bedford bridge company. By the act of 1851 the company was required to make and maintain in good repair in said bridge a draw of not less than sixty feet in width. The company failed to comply with this requirement, and it was indicted by the Commonwealth for maintaining a nuisance. It was contended also by the Commonwealth that the act incorporating the bridge company and authorizing the erection of the bridge was in conflict with the Constitution of the United States, which declares that the power to regulate commerce between the States is vested exclusively in the Federal Government.

The Court of Common Pleas directed a verdict of guilty, and reported the case, with the consent of the defendants, for the consideration of the Supreme Judicial Court of the State.

The opinion of the Court was delivered by

Mr. JUSTICE BIGELOW.

He held that the Legislature, in granting an act of incorporation to the defendants, authorizing them to construct a bridge over navigable waters, did not exceed their constitutional powers, and that the act was not repugnant to the clause of the Constitution conferring on Congress the power to regulate commerce. (p. 347.)

He says: "It is too well settled by the uniform practice of the "several States, as well as by the judicial decisions, to be drawn "in question that the power given to Congress under the Constitution, to regulate the use of and passage over the navigable "waters of the several States, does not impair the right of the "State Legislatures to enact laws upon all subjects of internal "police within their territorial limits, provided such enactments "do not interfere with the regulations of Congress on the same "subject, and that acts of a Legislature authorizing the construction of bridges over navigable waters within their own State "come within this principle, and are not unconstitutional." (p. 347.)

For these reasons the verdict was set aside.

DUNHAM vs. LAMPHERE, 3 Gray, 268, (1855.)

A State law regulating the time and manner of taking fish in the sea within its territorial limits is constitutional, and binding on citizens of other States although they may have a license from the United States Government.

(Counsel.) L. F. BRIGHAM for DUNHAM.
F. D. ROBINSON for LAMPHERE.

(Statute reviewed.) The act under review was a law passed in 1850 by Massachusetts which enacted that from and after the 1st of July, 1850, it should not be lawful for any person to take any fish, by seining, within one mile from the shores of Nantucket, Tuckernuck, Smith's, Muskeeket and Gravel Islands. The act declared a forfeiture of $50 for each offence and authorized the appointment of fish wardens whose duty it should be to prosecute for every offence. The seizure of boats employed in violation of the act was also authorized.

(History.) Lamphere, a citizen of Rhode Island, was arrested for violating this law, he admitted having taken the fish by seining within one mile of Gravel Island.

An action was brought against him to recover the penalty alleged to have been incurred by the violation of the statute. He contended that having obtained from the Government of the United States a license to fish in these waters, the Legislature of the State had no right to interfere with and deprive him of the right acquired by such license. He also contended the law above cited was unconstitutional.

The opinion of the Supreme Judicial Court of the State was delivered by

MR. CHIEF JUSTICE SHAW.

He held, that the Legislature of the State had the power to regulate the time and manner of taking fish in the sea within her territorial limits, and it was binding on citizens of other States, even if they had obtained a license from the Government of the United States.

He refers to Mr. Chief Justice Marshall's opinion in 3 Wheat., 386–7, where he says: "The jurisdiction of a State is co-exten "sive with its legislative power." (p. 270.)

He says: "The power to regulate the use of the fisheries on "the coasts and in the tide waters of the State, are left in the "distribution of powers between the General and State Govern- "ments, with the States, subject only to such powers as Congress "may justly exercise in the legislation of commerce, foreign and "domestic." (p. 273.)

He quotes from Vattel Bk., 1, § 246: "This venerable writer "says: 'In virtue of the same authority, (i. e. the dominion and "power which every independent government has over all things "within its territorial limits,) the sovereign may make laws to "regulate the manner in which common property is to be used.'" (p. 273.)

He says: "The general rule that the Legislature has power "to regulate the use and enjoyment of public and common rights, "is founded on the plainest principle of fitness, and well estab- "lished by authority and it is for the constitutional authorities of "the State to determine what regulations of this character will "best promote the public and common benefit." (p. 273.)

For these reasons judgment was given for the plaintiff."

DODGE vs. WOOLSEY, 18 Howard, 331, (1855.)

A State law imposing a higher tax on a bank than is stipulated in its charter is in conflict with the clause of the Constitution of the United States as impairing the obligation of the contract, and is therefore void.

(Counsel.) Messrs. SPALDING and PUGH for DODGE.
Messrs. STANBERRY and VINTON for WOOLSEY.

(Statute reviewed.) The statute under review was a law passed in 1852 by the State of Ohio, which provided for the assessment and taxation of all property in the State, and for levying taxes on the same according to its true value in money, &c.

(History.) Woolsey was the owner of several shares of stock in the Branch Bank of Cleveland, which was incorporated in 1845. The act incorporating the bank stipulated the amount of taxes which it should pay to the State. Dodge, the tax collector, assessed a certain amount of taxes against the bank under the act of 1852, and Woolsey brought suit against him in the Circuit Court of the United States for the district of Ohio, seeking to enjoin the collection of the tax, claiming an exemption from it as a stockholder upon the ground that the act of 1852 was in violation of the Constitution, which declares that no State shall pass any law impairing the obligations of contracts.

The Circuit Court rendered a final decree, enjoining the collection of the tax under the act of 1852, and subjected Dodge to the payment of the costs of suit. Dodge appealed from that decision to the Supreme Court of the United States.

The opinion of the Court was delivered by

MR. JUSTICE WAYNE.

The question in this case is whether the tax claimed has not been assessed in violation of the tenth section of the first article of the Constitution, which declares that no State shall pass any law impairing the obligations of contracts.

He says: "The States, or rather the people forming them, though "sovereign as to the powers not delegated to the United States "by the Constitution, nor prohibited by it to the States, are not "independent of each other in respect to the powers ceded in the "Constitution." (p. 351.)

"A careful examination of the two acts of the tabular returns "annexed to this opinion will prove that such equality of taxation "has not been retained. It will show that the bank is taxed more "than three times the number of mills upon the dollar that is assessed upon personal property. * * * That the tax to be "paid by the bank under the act of 24th February, 1824, is a legislative contract, equally operative upon the State and upon the "bank." (p. 360.)

He says: "A change of Constitution cannot release a State "from contracts made under a Constitution which permits them "to be made." (p. 360.)

For these reasons the judgment of the Circuit Court ought to be affirmed.

Mr. Justice Campbell dissenting,

He says: "The jurisdiction of Ohio is not only complete over "the public institutions of her government, but the subject matter upon which their will was expressed in their Constitution "was independently of their control over the corporations, one "over which their jurisdiction was plenary. They declared in "what manner property held within the State by these artificial "bodies should contribute to the public support in the form of "regular and apportioned taxation." (p. 375.)

"When the Constitution of the United States was before the "people of the States for their ratification, they were told that, "with the exception of duties on imports and exports, the States "retained an independent and uncontrollable authority to 'raise "their own revenue in the most absolute and unqualified sense.'" Vide Federalist, 163, by Hamilton, (p. 376.)

"In my opinion in Piqua Bank I exhibited evidence that the "care of the public domain, whether consisting of crown lands "or of taxes on property, belonged to the sovereign power of the "States." (p. 376.)

"That the people of the States should have released their powers "over the artificial bodies which originate under the legislation "of their representatives, or over the improvident charges or concessions imposed by them upon its revenues, or over the acts of "their own functionaries, is not to be assumed."

For these reasons he is of the opinion that the judgment of the Circuit Court should be reversed. Mr. Justice Daniel and Mr. Justice Catron dissented, and concurred with the above opinion.

COMMISSIONERS OF PILOTAGE vs. STEAMBOAT CUBA, ET AL., 23 Ala., 185, (1856.)

A State law imposing a penalty for not registering in the proper office the names and owners of steamboats is constitutional.

(Counsel.) JOHN F. TAYLOR for COMMISSIONERS.
Messrs. JONES, HAMILTON, DARGAN and LABUZAN for STEAMBOATS.

(Statute reviewed.) The act under review was a law passed in 1854 by Alabama, which imposed a penalty upon the owners of any steamboat navigating the waters of the State, for a failure to file in the proper office, before such boat leaves the port of Mobile, a written statement of the names and residences of her owners.

(History.) Proceedings were instituted by the commissioners of pilotage of the bay and harbor of Mobile to recover from several steamboats the penalty of $500, for an alleged violation of the act of 1854.

It was contended that the act was a regulation of commerce, and therefore unconstitutional.

The City Court of Mobile gave judgment for the defendants, and the case was brought by appeal to the Supreme Court of the State.

The opinion of the Court was delivered by

MR. CHIEF JUSTICE GOLDTHWAITE.

He held, that the power in Congress to regulate commerce does not prevent State legislation which does not conflict with any act of Congress in pursuance of this power.

He says: "We do not, however, admit that the mere grant of "the power to regulate commerce to Congress operates as an ab"solute prohibition on the States to legislate on the same subject, "as we are not aware that the affirmative of this proposition has "received the sanction of any court." (p. 197.)

He says: "If the statute of this State is to be referred to the "police powers, which in a broad sense embrace all legislation "for the internal regulation and domestic order of the State, (4 "Black Com., 162,) it falls directly within the influence that sus"tains a law; that the State, by a police law, may add a requisi"tion to those imposed by Congress in navigation between the "States, when the act operates within the limits of the State." (*Vide* Fitch *vs.* Livingston, 4 Sand. Supt. Ct. Rep., 492.)

For these reasons the decree of the court below is reversed, and the cause remanded.

◆

ABLEMAN vs. BOOTH, 21 Howard, 506, (1858.)

The process of a State court or judge has no authority beyond the limits of the sovereignty which confers the judicial power.

(Counsel.) Mr. BLACK, ATTORNEY GENERAL, for ABLEMAN.
No counsel appeared for BOOTH.

(History.) Sherman M. Booth was charged before a commissioner duly appointed by the District Court of the United States, for the district of Wisconsin, with having aided and abetted, at Milwaukee, in the said district, the escape of a fugitive slave from the deputy marshall, who had him in custody under a warrant issued by the district judge of the United States for that district, under the act of Congress of September 18, 1850.

Upon the examination before the commissioner, he was satisfied that such an offence had been committed, and that there was cause to believe that Booth had been guilty of it. He was committed by the commissioner to jail until he should be discharged by due course of law. He made application the following day to one of the justices of the Supreme Court of the State of Wisconsin for a writ of *habeas corpus*, stating that he was restrained of his liberty by the marshall of the United States for that district, and alleged that his imprisonment was illegal because the act of Congress of 1850 was unconstitutional and void. The justice decided that the detention was illegal, and ordered the marshall to discharge him and set him at liberty, which was done.

The marshall applied to the Supreme Court of the State for a *certiorari*, charging that the release of Booth by the justice was erroneous, and praying that his proceedings might be brought before the Supreme Court of the State for revision.

The *certiorari* was allowed, and the case was argued before the Supreme Court of the State, which affirmed the decision of the associate justice discharging Booth from imprisonment, with costs against the marshall.

The marshall sued out a writ of error to the Supreme Court of the United States.

The opinion of the Court was delivered by

MR. CHIEF JUSTICE TANEY.

He held that a State court or judge had no authority beyond the limits of the sovereignty which confers the judicial power.

He says: "And although the State of Wisconsin is sovereign "within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States." (p. 516.)

"No judicial process, whatever form it may assume, can have "any lawful authority outside of the limits of the jurisdiction of "the court or judge by whom it is issued; and an attempt to "enforce it beyond these boundaries is nothing less than lawless "violence." (p. 524.)

For these reasons the judgment of the Supreme Court of Wisconsin must be reversed.

PORT WARDENS vs. SHIP M. J. WARD, 14 La. An. Rep., 289, (1859.)

A State law requiring port wardens to perform certain duties in regard to vessels, for which they were to receive certain fees, is not a regulation of commerce, and is therefore constitutional.

(Counsel.) Messrs. C. ROSELIUS and M. HAHN for PORT WARDENS.

Messrs. GAITHER and M'PHEETERS for SHIP.

(Statute reviewed.) The act under review was a law passed in 1855 by Louisiana. By the requirements of this act the master and Wardens of the Port of New Orleans are obliged, if called upon by the captain of any ship or vessel arriving from sea, to inspect the manner in which the hatches of such ship or vessel were secured previous to the opening thereof for the purpose of discharge, and to be present at the opening of the same. They are also surveyors of damaged goods brought into the port, and it is their duty to order and direct the sales of damaged goods by public auction.

For these services fees are designated.

(History.) The master and wardens of the port of New Orleans instituted an action against the ship M. J. Ward, to recover ten dollars for fees of survey and five dollars for entrance fees.

It was contended that the act of 1855 was opposed to the eighth and tenth sections of article first of the Constitution of the United States, which declare, "that Congress shall have power to regulate commerce with foreign nations and among the several States," &c., and that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports," &c.

The Third Justice's Court of New Orleans gave judgment for the port wardens, and the defendants appealed to the Supreme Court of the State.

The opinion of the Court was delivered by

Mr. Justice COLE.

He held: "That the statutes organizing and establishing a "board of port wardens are of the same class as those relative to "inspection, guarantine and pilotage laws, or those for the regu-"lation of the internal commerce of a State, and are constitu-"tional." He refers to Gibbons *vs.* Ogden, 9 Wheat., p. 1, City of New York *vs.* Miln, 11 Peters, p. 102, Wilson, *et al.*, *vs.* Black Bird Creek Company, 2 Peters, 245, and Pennsylvania Bridge Company, 18 Howard, p. 421. These cases all decide that the pilotage laws, or those for the regulation of internal commerce, are constitutional.

Mr. Justice DANIEL concurred, but for different reasons.

His opinion was: "That the power of enacting pilot laws, al-"though in some degree connected with commercial intercourse, "does not come essentially and regularly within that power of "commercial regulation vested by the Constitution in Congress. "The power delegated to Congress by the Constitution relates "properly to the terms on which commercial engagements may be "prosecuted, the character of the articles which they may embrace, "the permission or terms according to which they may be intro-"duced." (pp. 290–1.)

He says: "In the absence of national legislation for the pro-"tection of commerce, there is an inherent right in the States to "protect themselves." (p. 292.)

That "Congress has not legislated on this subject, and the "States therefore have the right to do what is essential for the "protection of the shipping entering their ports."

For these reasons the judgment was affirmed, with costs.

PENNSYLVANIA RAILROAD COMPANY vs. THE COMMONWEALTH, 3 Grant's Cases, 128, (1860.)

A State law imposing a toll or duty upon all tonnage of whatsoever kind or description, except the ordinary baggage of passengers carried or conveyed on said road, is constitutional.

It is not such a duty on tonnage as is prohibited by the Constitution of the United States.

(Counsel.) No names of counsel reported.

(History.) The question reviewed in this case arose upon a clause in the charter of the railroad company, providing that all tonnage of whatsoever kind or description, except the ordinary baggage of passengers, carried or conveyed on said road, in each and every year, should be subject to a toll or duty for the use of the Commonwealth of three mills per ton per mile.

It was contended that this tax was a violation of the provisions of the Constitution of the United States. The Court of Common Pleas of Dauphin county sustained the tax, and the case was taken on writ of error to the Supreme Court of the State.

The opinion of the Court was delivered by

MR. CHIEF JUSTICE LOWRIE.

He says: "Though this charter does say that all tonnage carried on this railroad shall be subject to a toll or duty of three "mills per ton per mile, yet it is quite apparent that this is not "intended as a means of taxing commerce or the goods carried, "but simply as a mode of taxing the company according to the "magnitude of its business. We say this is apparent because the "State is not to look to the goods carried or their owners for the "tax, but only to the company, so as to measure a portion of its "taxes by the amount of a particular portion of its business." (p. 129.)

"The charter is intended to regulate the relation of the com-"pany with the State and not those of other persons." (p. 129.)

"Now they seek to evade the law or contract by setting up the "the defence that it violates the Constitution of the United States, "and is therefore void. Is it so? If this question is to be an-"swered in the affirmative it must be done on some original prin-"ciple that has as yet received no practical application, for no "case has been cited, and we know of none, in which such a rule "of law, or any closely analogous one, has been announced." (p. 129.)

He asks: "How can the exclusive power of Congress to regu-"late commerce, be understood as forbidding this tax." (p. 129.)

"No such latitudinarianism of interpretation has ever been ap-"plied to this clause. Making roads is a mode of regulating "commerce by giving it facilities and direction, but no one has "ever been taught that this clause excludes the States from making "their own roads, and their laws to govern the use of them, or "from imposing road taxes in their own form for travel upon "them, even a tax that may afford an income beyond the expense "of construction and repairs." (pp. 129 and 130.)

"Surely a State may improve its own domains and thorough-"fares as it chooses, and impose its own terms in the common "use of them." (p. 130.)

"There is no distinction made in this charter between goods of "our own citizens and those of others." (p. 130.)

"What we have before said shows that no duty is imposed on "goods at all, and of course none on imports or exports. It is so "plainly not a duty of this sort, that we must acknowledge that "we have not skill enough to frame an argument that can make "it plainer." (p. 131.)

"*Now is it a duty on tonnage? This means simply that sort of "duty that at the date of the Constitution was called tonnage, and "that was a duty on ships or their cargoes imported or exported, "measured by their capacity or weight.*" (p. 131.)

For these reasons the judgment of the court below was affirmed.

COMMONWEALTH vs. THE PEOPLE'S FIVE CENTS SAVINGS BANK, 5 Allen, 428, (1862.)

A State law imposing a tax on a savings bank on the amount of its deposits is a tax on the corporation and its franchises, and is constitutional.

(Counsel.) FOSTER, ATTORNEY GENERAL, for COMMONWEALTH. Messrs. C. P. HUNTINGDON and J. P. HEALY for BANK.

(Statute reviewed.) The act under review was a law passed in 1862 by Massachusetts, which enacted that every savings bank and institutions for saving, incorporated by the laws of that State, should pay to the Treasurer of the Commonwealth a tax on account of its depositors of one-half of one per cent. per annum on the amount of its deposits, to be assessed, one-half of said annual tax on the average amount of its deposits for the six months preceding the first day of May, and the other on the average amount of its deposits for the six months preceding the first day of November.

(History.) The Treasurer assessed a tax under the provisions of this act against the People's Five Cent Savings Bank, which it refused to pay, contending that the act imposed a tax upon the property, and not the franchises of the bank, and that it was therefore unconstitutional.

A bill in equity was brought by the Treasurer and Receiver General of the Commonwealth against the bank in the Supreme Judicial Court of Massachusetts, and upon this bill a temporary injunction was issued, and the defendants appealed to the whole court.

The opinion of the Court was delivered by

MR. CHIEF JUSTICE BIGELOW.

He held, that the tax was on the corporation and its franchises, graded according to the amount of its deposits.

He says: "Having in mind these well-settled rules of exposi-"tion, it appears to us that the assessment imposed by the pro-"visions of the statute under consideration must be regarded as "an excise or duty on the privilege or franchise of the corpora-"tion, and not as a direct tax on money in its hands belonging to "depositors." (p. 432.)

"It is the extent to which the corporation has exercised the "franchise conferred on it by law, of receiving deposits during a "certain period, that is made the basis on which to estimate the "sum which is to be paid for the enjoyment of the privilege. It "is difficult to see in what mode a more just and equitable assess-"ment could be laid on corporations of this peculiar character "under the authority to impose an excise or duty on their fran-"chise." (p. 433.)

"The excise is not laid on the business which each bank has "transacted in the way of receiving deposits during the six "months preceding June, 1862, but upon the value of the fran-"chise at that date; that is, its present capacity to transact busi-"ness, and the amount and extent of its operations, estimated by "the standard of the average of deposits which it had on hand "during the period immediately preceding. This is not a retro-"active provision, but only a fair mode of ascertaining the exist-"ing value of a subject of taxation." (p. 438.)

For these reasons the injunction was continued.

NEW JERSEY vs. THE DELAWARE, LACKAWANNA AND WESTERN R. R. CO., 1 Vroom, 473, (1864.)

A State law laying a tax on the business of a foreign corporation, doing business in the State, such tax being graduated by the number of passengers and weight of goods carried, is constitutional.

(Counsel.) FREDERICK T. FRELINGHUYSEN, ATTORNEY GENERAL, for the STATE.

Messrs. J. G. SHIPMAN, DAVID A. DEPUE and J. W. SCUDDER for RAILROAD COMPANY.

(Statute reviewed.) The act under review was a law passed the 28th of March, 1862, by New Jersey, which, by its tenth section, provides that all corporations regularly doing business in that State, and not being corporations of that State, should be assessed and taxed for and in respect of the business done by them in the State in manner following: Every such company so doing business shall pay a transit duty of three cents on every passenger, and two cents on every ton of goods, wares and merchandise or other articles carried or transported by or for such company on any railroad, or carried in the State for any distance exceeding ten miles, except passengers and freight transported exclusively within the State.

(History.) An issue was made up between the State and the company, respectively, and cases were agreed on to be submitted to the Supreme Court for their decision without a jury.

The company contended that the act was an infringement of the Constitution of the United States, which confers upon Congress the power to regulate commerce between the several States, &c.

The opinion of the Court was delivered by

Mr. JUSTICE HAINES.

He held, that a State law levying a special tax on the business of a foreign corporation, doing business in the State, such tax being graduated by the number of passengers and weight of goods carried, is not in violation of the Constitution. Such commerce is not of such a national character that a State may not regulate it in the manner complained of without violating the Constitution. That the tax is merely a tax on the company according to the amount of its business, and is not a regulation of commerce among the States.

He says: "When commerce is of a national character there is "no constitutional or legal power in a State to interrupt, impede "or regulate it, but where it has not a national character, the "States may do many things to regulate it, and some that more "or less effect commercial intercourse without any violation of the "Constitution." (p. 478.)

"That the regulation of the fares and tolls on turnpikes, rail"roads and ferries, even directly between two States, are wholly "within the jurisdiction of the States, and such power has been "continually exercised." (p. 470.) Vide the Chosen Freeholders of Hudson county vs. the State, 4 Zab., 730.

He says: It does not come within the ruling of Gibbons vs. Ogden, 9 Wheat., 1, "as it does not exclude from the State any class "of persons or property, or of vessels or other vehicles of trans"portation, as did the act of New York, which granted to certain "individuals the exclusive use of its waters for navigation of ves"sels." (p. 479.)

"Nor does it prohibit or restrain the sales, and thereby tend to "impede the importation of any article, by requiring the vender "to obtain a license to sell," as in Brown vs. Maryland, 12 Wheat., 419, and in the License cases, 5 How., 504, (p. 479.)

"It makes no discrimination between the property of citizens "of this State or of other States, nor are the passengers or the "owner of the goods, or the goods themselves, in any wise made "subject to the tax or retarded by it." (p. 479.)

For these reasons judgment was rendered for the State.

Mr. Justice Vredenburgh concurred.

Mr. Justice Vandyke dissented.

BANK TAX CASE, 2 Wallace, 200, (1864.)

A State law laying a tax on the capital stock of a bank is a tax on the property of the institution and not on its franchise. It cannot, therefore, reach stock which is composed of Federal bonds exempt by law.

(Counsel.) Messrs. DEVLIN, BRADY and KERNAN for TAX COMMISSIONERS.

Messrs. LORD, BRADFORD, SILLIMAN, MARSHALL SPRING BIDWELL, BENEDICT, BONNEY, VAN WINKLE and others for different BANKS.

(Statute reviewed.) The act under review was a law passed April 29, 1863, by the Legislature of New York, which enacted that "all banks, banking associations, &c., shall be liable to taxation on a valuation equal to the amount of their capital stock paid in or secured to be paid in, and their surplus earnings, &c., in the manner now provided by law," &c.

(History.) Under this act the tax commissioners laid a tax upon the different banks of New York city, some of which had invested their whole capital in the securities of the Federal Government, and others of which had largely done so.

The question was, whether this act did not impose a tax on these stocks, which by law of Congress are exempt from taxation by or under State authority.

The Court of Appeals of New York decided that it did not, and the case was carried to the Supreme Court of the United States.

The opinion of the Supreme Court of the United States was delivered by

MR. JUSTICE NELSON.

He says: "That the tax on the capital of the Bank of the Commonwealth is a tax on the property of the institution." (p. 210.)

He held, that a tax laid by the State of New York on every bank, or a valuation equal to the amount of the capital stock paid in or received to be paid in, is a tax on the property of the institution and not on the franchise, and when that property consists of bonds of the Federal Government, which are by law exempt from State taxation, the law laying the tax as to them is unconstitutional and void.

For these reasons the judgment of the court below was reversed.

THE PASSAIC BRIDGES, 3 Wallace, 782, (1865.)

A State law authorizing bridges to be built over rivers wholly within its jurisdiction is constitutional.

(Counsel.) No names of counsel reported.

(Statute reviewed.) The act under review was a law passed by New Jersey authorizing the New Jersey railroad company to erect two bridges, one at and the other near the city of Newark, across the Passaic river.

(History.) Bills were filed in the Circuit Court of the State by several citizens of New York owning wharves in the city of Newark, to restrain the railroad company from erecting the bridges. The bridges were required to have pivot draws, having two passages of sixty-five feet each, for the passage of vessels navigating the river. The complainants sought the injunction on the grounds:

1st. That the Passaic river was a public highway of commerce, which, under the Constitution of the United States, has been regulated by Congress.

2d. That the free navigation of the river as a common highway, having been established by regulation of Congress, and by compact between the States, it could not lawfully be obstructed by force of any State authority or legislation.

3d. That the bridges proposed to be erected would be each an obstruction to the free navigation of the river, and public nuisances.

The opinion was delivered by

MR. JUSTICE GRIER.

He held that a State had the power to authorize bridges to be erected over rivers wholly within its jurisdiction.

He says: "Congress has the exclusive power to regulate commerce, but that has never been construed to include the means "by which commerce is carried on within a State. Canals, turnpikes, bridges and railroads are as necessary to the commerce "between and through the several States as rivers, yet Congress "has never pretended to regulate them." (p. 792.)

"A State may, in the exercise of its reserved powers, incidentally affect subjects entrusted to Congress without any necessary "collision. All railroads, canals, harbors or bridges necessarily "affect the commerce not only within a State, but between the "States. Congress, by conferring the privilege of a port of entry "upon a town or city, does not come in conflict with the police "powers of a State, exercised in bridging her own rivers below "such port. If the power to make a town a port of entry includes "the right to regulate the means by which its commerce is carried on, why does it not extend to its turnpikes, railroads and "canals, to land as well as water? Assuming the right (which I "neither affirm or deny) of Congress to regulate bridges over "navigable waters below ports of entry, yet not having done so, "the courts cannot assume to themselves such a power." (p. 793.)

"The police power to make bridges over its public rivers is as "absolutely and exclusively vested in a State as the commercial "power is in Congress; and no question can arise as to which "is bound to give way when exercised over the same subject "matter, till a case of actual collision occurs." (p. 793.)

For these reasons the bills were dismissed, with costs.

This decree was subsequently affirmed by the Supreme Court of the United States, the court being equally divided, however, and no opinion given.

PROVIDENT INSTITUTION vs. MASSACHUSETTS, 6 WALLACE, 611, (1867.)

A State law imposing a tax upon the deposits of a saving institution, a portion whereof were invested in Federal securities, is constitutional. It is a tax upon the franchise and not upon the property.

(Counsel.) Messrs. BONNEY and BARTLETT for INSTITUTION.

Mr. ALLEN, ATTORNEY GENERAL, for MASSACHUSETTS.

(Statute reviewed.) The act under review was a law passed in 1862 by Massachusetts, entitled "An Act to levy taxes on certain insurance companies and on depositors in savings banks." The fourth section of the act provides that every institution for savings, incorporated under the laws of that State, should pay to the Commonwealth a tax on account of its depositors of one-half of one per cent. per annum on the amount of its deposits, &c.

(History.) The Provident Institution for Savings was a corporation authorized by a statute of Massachusetts to receive money on deposit, for the use and benefit of the depositors, and to invest its deposits in securities of the United States. The institution had part of its deposits invested in public funds of the United States, exempt by law of the United States from taxation under State authority. Upon the sum thus invested it declined to pay a tax. The Commonwealth brought suit to recover the same, and the Supreme Judicial Court of the State, regarding the tax as on the franchise and not on the property, and therefore lawful, gave judgment for the Commonwealth. The case was taken on writ of error to the Supreme Court of the United States.

The opinion of the Supreme Court of the United States was delivered by

MR. JUSTICE CLIFFORD.

He says: "The States cannot tax the instruments of the Federal Government, nor the means employed by Congress to carry "into effect the powers conferred in the Federal Constitution, *although their authority is undeniable to tax all subjects over which the sovereign power of the State extends*." (p. 622.)

"That the privileges and franchises of a private corporation, "unless exempted in terms which amount to a contract, are as "much the legitimate subject of taxation as any other property "of the citizens which enjoys the protection and is within the "control of the sovereign power of the State." (p. 623.)

"That private corporations, and all trades and avocations by "which the citizens acquire a livelihood, may be taxed by the State "for the support of the State government. That this power rests "in the discretion of the Legislature to decide whether the sum "to be levied shall be a fixed one, and if not to determine in what "manner and by what means the amount shall be determined." (p. 623.)

The question is whether the tax imposed in this case is to be regarded as a tax on property or a tax on the privileges and franchises of the corporation.

It was held that the act authorizing the tax lays a direct assessment upon the property of the corporation.

He says: "But the assessment of the tax is to be made semi-"annually on the average amount of their deposits for the six "months preceding the respective days named, and not on the "value of the property as supposed. Reference to the average "amount of the deposits is made, not as descriptive of the sub-"ject to be assessed, but as furnishing the basis of computing the "amount of the tax to be paid by the corporation. The subject "matter to be taxed is the corporation, and the average amount "of the deposits within the period named furnish the basis of com-"puting the amount." (p. 627.)

For these reasons the judgment of the Supreme Court was affirmed.

Mr. Chief Justice Chase, Mr. Justice Grier and Mr. Justice Miller dissented, on the ground that the tax was on the property and not on the franchise.

SOCIETY FOR SAVINGS vs. COITE, 6 Wall., 594, (1867.)

A State law imposing an annual tax on savings banks equal to three-fourths of one per cent. on the total amount of their deposits on a given day, imposes a franchise tax, not a tax on property, and is valid.

(Counsel.) Mr. **CHAMBERLAIN** for **BANK.**
Messrs. **HUBBARD** and **M'FARLANE** for **COITE.**

(Statute reviewed.) The statute under review was a law passed in 1863 by Connecticut, which enacted that the several savings banks in the State should make annual return to the comptroller of public accounts "of the total amounts of all deposits" in them, respectively, on the first day of July in each successive year, and that each should annually pay to the treasurer of the State a sum equal to three-fourths of one per cent. on the total amount of deposits in such savings banks on the days aforesaid, and this tax should be in lieu of all other taxes upon savings banks or their deposit.

(History.) The Society for Savings was one of the savings banks of Connecticut, and as such was empowered to receive deposits of money, but having no stock or stockholders, had on the first of July, 1863, $500,161 of its deposits invested in securities of the United States, which, by the act of Congress, were declared to be exempt from taxation by State authority, whether held by individuals, corporations or associations. Upon the amount of their deposits so invested the society refused to pay the sum required.

Coite, the State Treasurer, brought suit against the bank to recover the tax so withheld. The Supreme Court of the State decided in favor of the plaintiff, and the case was carried to the Supreme Court of the United States.

The opinion of the Court was delivered by

MR. JUSTICE CLIFFORD.

He says: "All subjects over which the sovereign power of a State "extends are, as a general rule, proper objects of taxation, but "the power of the State to tax does not extend to those means "which are employed by Congress to carry into execution the "powers conferred in the Federal Constitution." (p. 605.)

He says: "Unquestionably the taxing power of the States is "very comprehensive and pervading, but it is not without limits. "They may extend to every object of value within the sovereignty "of the State, but they cannot reach the administration of justice "in the Federal courts, nor the collection of the public revenue, "nor interfere with any constitutional regulation of commerce." (p. 605.)

"The power to tax is granted for the benefit of all, and none "have any right to complain if the power is fairly exercised and "the proceeds are properly applied to discharge the obligations "for which the taxes were imposed. Such a power resides in government as a part of itself, and need not be reserved when property of any description, or the right to use it in any manner, "is granted to individuals or corporate bodies." (p. 606.) Vide 4 Peters, 563.

"Unless exempted in terms which amount to a contract, the "privileges and franchises of a private corporation are as much "the legitimate subjects of taxation as any other property of the "citizens which is within the sovereign power of the State. Repeated decisions of this court have held, in respect to such corporations, that the taxing power of the State is never presumed "to be relinquished, and consequently that it exists unless the intention to relinquish it is declared in clear and unambiguous "terms." (p. 606.) Vide P. and W. R. R. Co. vs. Maryland, 10 How., 393.

"Nothing can be more certain in legal decision than that the "privileges and franchises of a private corporation, and all trades "and avocations by which citizens acquire a livelihood, may be "taxed by a State for the support of the State government. Authority to that effect resides in the State, independent of the "Federal Government, and is wholly unaffected by the fact that "the corporation or individual has or has not made investments "in Federal securities." (p. 607.) Vide Osborn vs. Bank of United States, 9 Wheaton, 859.

"Private corporations engaged in their own business and pur-

"suing their own interest, according to their own will, are as much "subject to the taxing power of the State as individuals, and it "cannot make any difference whether the tax is imposed upon "their property or the franchise of the corporation, as both are "alike under the protection and within the control of the sove-"reign power." (p. 607.) Vide Angell and Ames on Corporations, eighth ed.

For these reasons judgment was affirmed with costs.

The Chief Justice, Justice Grier and Justice Miller dissented, on the ground that the tax was a tax on the property and not upon the franchises and privileges of the plaintiff in error.

◆

LANE COUNTY vs. OREGON, 7 Wallace, 71, (1868.)

A State law declaring that taxes must be paid in gold and silver coin is constitutional. The National Legislature cannot interfere with the exercise of that power originally in the States and never yet surrendered.

(Counsel.) Mr. WILLIAMS for LANE COUNTY.
Mr. JOHNSON for OREGON.

(Statute reviewed.) The law under review was an act passed by Oregon, enacting that the sheriff shall pay over to the county treasurer the full amount of the State and school taxes in gold and silver coin, and that the several county treasurers shall pay over to the State Treasurer the State tax in gold and silver coin.

(History.) The State of Oregon filed a complaint in April, 1865, against the county of Lane in the Circuit Court of the State for that county to recover $5,460 96 in gold and silver coin, which sum was alleged to have become due, as State revenue, from the county to the State.

It was contended that the laws of Oregon did not require the collection in coin of the taxes in question, and that the treasurer of the county could not be required to pay the State Treasurer any other money than that in which the taxes were actually collected, viz: In United States notes, which were warranted by the acts of Congress and the law of the State if requiring the collection and payment in coin was repugnant to these acts and therefore void. The Circuit Court gave judgment for the State for the sum claimed, in gold and silver coin, with costs of suit, and this judgment was affirmed, upon writ of error, by the Supreme Court of the State.

The opinion of the Court was delivered by

MR. CHIEF JUSTICE CHASE.

He says: "In this court the construction given by the State "courts to the laws of the State relating to local affairs is uni"formly received as the true construction, * * * * and the "State courts have held that the statutes of Oregon, either di"rectly or by clear implication, required the collection of taxes "in gold and silver coin." (p. 74.)

"The clauses in the several acts of Congress of 1862 and 1863, "making United States notes a legal tender for debts, have no "reference to taxes imposed by State authority."

He says: "The people of the United States constitute one na"tion, under one government, and this government, within the "scope of the powers with which it is invested, is supreme. On "the other hand, the people of each State compose a State, having "its own government and endowed with all the functions essen"tial to separate and independent existence." (p. 76.)

"Both the States and the United States existed before the Con"stitution. The people, through that instrument, established a "more perfect union by substituting a national government, acting "with ample power directly upon the citizens instead of the con"federate government, which acted with powers, greatly restricted, "only upon the States. But in many articles of the Constitution "the necessary existence of the States, and within their proper "spheres, the independent authority of the States is distinctly "recognized. To them nearly the whole charge of interior regu"lation is committed or left. To them and to the people all powers "not expressly delegated to the National Government are reserved." (p. 76.)

"*Now to the existence of the States, themselves necessary to the existence of the United States, the power of taxation is indispensable. It is an essential function of government.* It was exercised by the colonies, and when the colonies became States, both before and after the formation of the confederation, it was exercised by the new governments. Under the articles of confederation the government of the United States was limited in the exercise of this power to requisitions upon the States, while the whole power of direct and indirect taxation of persons and property, whether by taxes on polls or duties on imports, or duties on internal productions, manufacture or use, was acknowledged to belong exclusively to the States without any other limits than that of non-interference with certain treaties made by Congress. The Constitution, it is true, greatly changed this condition of things. * * * * No power to tax exports or imports, except for a single purpose and to an insignificant extent, or to lay any duty on tonnage, was permitted to the States. *In respect, however, to property, business and persons, within their respective limits, their power of taxation remained and remains entire.* It is, indeed, a concurrent power, and in the case of a tax on the same subject by both governments, the claim of the United States, as the supreme authority, must be preferred, but with this qualification it is absolute. The extent to which it shall be exercised, the subjects upon which it shall be exercised and the mode in which it shall be exercised are all equally within the discretion of the Legislatures to which the States commit the exercise of the power. * * * * There is nothing in the Constitution which contemplates or authorizes any direct abridgement of this power by national legislation. To the extent just indicated, it is as complete in the States as the like power within the limits of the Constitution is complete in Congress." (pp. 76 and 77.)

For these reasons the judgment of the Supreme Court of Oregon must be affirmed.

DOWNHAM vs. ALEXANDRIA, 9 Wallace, 659, (1869.)

A State law restricting appeals to the Supreme Court of the State to cases in which the sum in controversy exceeds one thousand dollars is constitutional.

(Counsel.) D. L. SMOOT, Esq., for ALEXANDRIA.
Messrs. G. W. BRENT and C. W. WATTLES for DOWNHAM.

(Statute reviewed.) The act under review was a law passed in 1867 by Virginia, which enacted that appeals to the Supreme Court of that State from the State district courts should not be allowed when the judgments of the county courts were affirmed, unless the matter in controversy exceeded $1,000.

(History.) The city of Alexandria, on a suit brought by it in one of the county courts of the State against Downham, a dealer in liquors, had obtained a judgment for $200, the amount of tax imposed on dealers of his class. Downham took the case by appeal to the Fourth Judicial District Court of the State, in which the judgment of the county court was affirmed. He then brought the case from that court to the Supreme Court of the United States.

There was a higher court of law in the State than the Fourth Judicial District Court, to wit: The Supreme Court of Appeals, but Downham did not take the case to it, assuming that by the Constitution and laws of Virginia he could not properly do so.

The questions, therefore, were whether, under the Constitution and laws of Virginia, Downham was correct in assuming that he had no right to go to a higher court than that of the Fourth Judicial District, and whether he could bring the case from it to the Supreme Court of the United States, there being a higher court of law and equity in the State.

The opinion of the Court was delivered by

MR. CHIEF JUSTICE CHASE.

He says: "That the act of February, 1867, extends the limitation upon appeals to all cases where original judgments of the

'Circuit Court are fully sustained by the judgment of the District 'Court, and where the amount in controversy does not exceed 'the legislative limit."

"That this case, though not excluded from the appellate juris'diction of the Court of Appeals by the Constitution, seems to 'be excluded by this act."

The question in this case is whether the act of the Legislature s in conflict with the Constitution of the State, and he says that he perceives no conflict.

That as the Legislature thought fit to make the judgment of the District Court in this case final, and without appeal, that court is for the case the highest court in which the decision could be made, and the writ of error is therefore warranted by act of Congress and regular.

For these reasons the motion to dismiss was denied.

CRAIG vs. KLINE, 15 P. F. Smith, 399, (1870.)

A State law regulating the floating of logs on a navigable stream is a lawful exercise of the police power of the State, and is constitutional.

Counsel.) Messrs. A. C. SIMPSON, S. LINN, C. J. T. M'INTIRE, BLACK and MEREDITH for CRAIG.

Messrs. S. G. THOMPSON and B. F. JUNKIN for KLINE.

(Statute reviewed.) The act under review was a law passed by Pennsylvania in 1866, which enacted that it shall not be lawful for any person or persons, company or companies, &c., to float or direct and authorize to be floated down the Susquehanna river, between the town of Northumberland and the line of the State of Maryland, any saw logs without the same being rafted and joined togethe or enclosed in boats, and under the control, supervision and pilotage of men especially in charge of the same and actually thereon And any person or persons may take up the said saw logs, or an of them, if they be found floating loose in said streams and no under the personal charge of some one upon the same, and shal have the right to hold and possess the same against all person whatsoever: *Provided*, That if the owner or owners of said logs or their agents, shall appear and demand the same, and shall pa said captors fifty cents for each and every saw log so taken u within two months from the date of their being so taken up, i shall be the duty of the captor or captors to deliver over said log to the owner or owners; but if no such owner or agents appea within said time, and pay or offer to pay to the captor or captor the said salvage money, the said saw logs shall be absolutely forfeited to and become the property of said captor or captors.

(History.) Craig was the owner of logs placed in the Susquehann river, and permitted the same to be floated into the main river a Northumberland and down the same without the said logs bein rafted and joined together, or enclosed in boats, and under th control, supervision and pilotage of men specially placed in charg of the same and actually thereon, for the purpose of floating them thus loosely to the mills below the line of the State of Maryland Kline captured about 370 of these logs, and as they were not rafte together, nor any one with them, he claimed the right to hold them under the provisions of the act of 1866.

The Court of Common Pleas gave judgment for plaintiffs, but the verdicts not being for the amount claimed, a writ of error was taken to the Supreme Court of the State.

The opinion of the Court was delivered by

MR. JUSTICE AGNEW.

He says: "It is a difficult problem now to define the boundaries of State and Federal powers." (p. 407.)

The question in this case is the power of Pennsylvania to legislate upon the navigation of the river Susquehanna, and this involves a Federal power exceedingly intimate in its relations to the subjects of State sovereignty.

He refers to Gibbons vs. Ogden, 9 Wheat., 1, where Chief Justice Marshall says: "That the power vested in Congress to regu-"late commerce, &c., cannot stop at the external boundary line "of each State, but may be introduced into the interior, and it "comprehends navigation within the limits of every State in the "Union, so far as that navigation may be in any way connected "with commerce, and may, therefore, pass the jurisdictional lines "of the States and act upon the very waters to which the State "legislation applies." (p. 408.)

He says: "That while thus asserting the great extent of the "Federal power, the opinion concedes to the State an immense "mass of legislation, which embraces everything within the ter-"ritory of a State not surrendered to the General Government, "all of which can be most advantageously exercised by the States "themselves." (p. 408.)

"The powers reserved to the States (says the forty-fifth number "of the Federalist) will extend to all the objects which, in the or-"dinary course of affairs, concerns the lives, liberties and property "of the people, and the internal order, improvement and pros-"perity of the State, or, as Mr. Justice M'Lean says, 'all powers "which properly appertain to sovereignty, which have not been "delegated to the Federal Government, belong to the States and "the people.'" Vide New Orleans vs. United States, 10 Peters, 737, Wilson vs. Blackbird Creek Marsh company, 2 Peters, 245, and the License cases, 5 How., 582–3, 592, (p. 408.)

He refers to Story on the Constitution: "A State may use the "same means to effectuate an acknowledged power in itself which "Congress may apply for another purpose." (p. 408.)

He refers to Cooley vs. the Board of Wardens of Philadelphia, 12 How., 318, and says: "The question may be considered as now "settled in conformity with the opinion of Chief Justice Taney, "which holds the grant of the power to regulate commerce is not "exclusive, but that the question in each case depends on the "character of the subject, some requiring it to be treated as ex-"clusive and others not so." (p. 409.)

"It seems clear that when a State exercises her own sovereign "power in a matter involving the interests of her citizens, though "it may act upon a subject within the field of the power to regu-"late commerce, it is not for that reason invalid if it conflicts with "no law Congress has passed upon the same subject." (p. 409.)

He then takes up the question of the power of the Legislature to prohibit the floating of loose saw logs in the Susquehanna river.

He says: "The act of December 11, 1866, concerns not only "the police power, but the right of eminent domain of the State." (p. 410.)

"That the Constitution of the United States confers no power "of eminent domain or of legislation over State territory, except "that contained in the sixteenth clause, eighth section, first article, relating to the seat of government and places purchased "with the consent of the States for forts, magazines, &c." (p. 410.)

He refers to Pollard vs. Hagan, 3 How., 229, "where it was held "that the United States had no constitutional capacity to exercise "municipal jurisdiction, sovereignty or eminent domain within "the limits of a State or elsewhere, except in the cases in which "it is expressly granted." (p. 410.)

For these reasons he says that the act was a lawful exercise of the police power of the State upon a subject within her rightful jurisdiction, and is not repugnant to any law of Congress passed to regulate commerce on this river, and it is therefore valid and constitutional.

He next takes up the question whether the mode of forfeiture provided in the law is valid.

He says: "That a forfeiture cannot take place without notice, "and that such a forfeiture would be contrary to the provision in "the bill of rights, that no one shall be deprived of his property "unless by the judgment of his peers or the law of the land." (p. 415.)

For these reasons the judgment was reversed and a *venire de novo* awarded.

JOHNSON vs. DRUMMOND, 20 Grattan, 419, (1871.)

A State law imposing a tax on every ton of oysters taken from her waters is constitutional.

(Counsel.) JOHN WISE, Esq., for Johnson.
The ATTORNEY GENERAL for Drummond.

(Statute reviewed.) The statute under review was a law passed May 3, 1866, by Virginia, which required the captain or officer of every vessel employed in carrying oysters taken in the waters of Virginia to obtain from an inspector a license, for which he should pay to said inspector a tax of three dollars per ton for every ton said vessel may measure, according to the custom house enrolment or license, &c.

The inspector was authorized to attach the vessel of any captain or officer failing or refusing to obtain the license.

(History.) Johnson was the owner of several vessels which were attached by Drummond, an inspector, and advertised for sale for the non-payment of the license tax.

Johnson contended that the act imposing the tax was in conflict with the Constitution of the United States, which declares that "no State shall, without the consent of Congress, lay any duty of tonnage."

The Circuit Court of Aconnac granted an injunction to restrain the sale. The Circuit Court of Richmond dissolved the injunction, and the case was carried to the Court of Appeals, which reversed the decree of the Circuit Court.

The opinion of the Court was delivered by

Mr. Justice MANCURE.

The question in this case is whether the seventh section of the act is contrary to the Constitution of the United States,—

1. "That Congress shall have power to regulate commerce, &c."
2. "That no State shall have power, without the consent of Con-"gress, to lay imposts or duties on imports or exports."

3. "That no State shall, without the consent of Congress, lay "any duty of tonnage, &c."

"In regard to the first and second of these provisions little need "be said. The power to regulate commerce is given to Congress, "but it is not expressly denied to the States. An exercise of a "power by a State which may be perfectly consistent with the "acts of Congress, if any, on the subject, is constitutional, though "it may in its nature or effect be a regulation of commerce between the States, especially if it does not discriminate between "the States." (p. 429.)

That the act is not unconstitutional on that ground, as it is not inconsistent with any act of Congress and makes no such discrimination.

"All will admit that the State has exclusive control over commerce confined to her own limits." (p. 430.)

He refers to Woodruff vs. Parham, 8 Wall., U. S. R., 123: "That "the Supreme Court has in this case decided in effect that the "clause in the Constitution prohibiting a State, without the consent of Congress, from laying imposts or duties on imports or "exports applies only to foreign commerce and not to inter-State "commerce, and that this act does not impose such a duty." (p. 430.)

"The only question then is does the act lay a duty on tonnage "in the meaning of the Constitution. A duty on tonnage in this "connection is a tax on a vessel, and a tax on a vessel as such is "in effect a tax on commerce, and would be unconstitutional, but "this act does not lay a tax on the vessel but on the oysters or "the business of carrying them." (p. 431.)

"The oysters in the waters of the State belong to her, and she "can do what she pleases with them. As long as they remain "public property she has no occasion to tax them, but as soon as "this public property becomes private, it then becomes a subject "of taxation, and it can become private only in the mode and on "the terms prescribed by law, and the mode in this case is by "taking out a license." (p. 431.)

"If oysters could be caught on land, the capacity of the wagon "that hauled them away might be made the measure of the tax "on the license for conducting the business, and there would be "no ground for objection to the tax as unconstitutional." (p. 432.)

For these reasons he says (p. 432) that there is nothing in the act in conflict with the Constitution of the United States, and the mode of taxation may be eminently useful as a means of deriving revenue from a most valuable subject belonging to the State. The decree of the Circuit Court was therefore affirmed, and the decree of the Court of Appeals reversed.

Mr. Justice Anderson concurred.

ELIAS WARD vs. THE STATE OF MARYLAND, Legal Intelligencer, Jan. 12, 1872, page 5, (1871.)

A State law imposing a license tax upon citizens of other States greater than on her own citizens is unconstitutional.

(Statute reviewed.) The act here reviewed was a law of the State of Maryland, which imposed a license tax of $300 upon non-residents offering for sale, selling, &c., certain goods, either by card, sample, &c., and imposing a penalty of $400 to $600 for each offence, while the license tax for residents is fixed at from $12 to $150.

(History.) Ward was a citizen of New Jersey and not a permanent resident of the State of Maryland. He was indicted for selling "by specimen, to wit, by sample," certain goods other than agricultural products or articles manufactured in the State without first obtaining a license.

He contended that the act was unconstitutional. The Criminal Court sentenced him to pay a fine of four hundred dollars and costs, and the Court of Appeals affirmed this judgment.

The opinion of the Supreme Court of the United States was delivered by

MR. JUSTICE CLIFFORD.

The question in this case was whether the statute of the State was or was not constitutional and valid.

He refers to the clause of the Constitution giving power to Congress "to regulate commerce with foreign nations," and also to the clause "that the citizens of each State shall be entitled to all "privileges and immunities of citizens in the several States."

He says: "State power to lay and collect taxes may reach *every* "*subject* over which the unrestricted power of the State extends."

He says: "Implied prohibitions restricting the power of the "States to lay and collect taxes also exist, which are as effectual "to that end as those which are express. *Undoubtedly the States* "*may tax every subject of value within the sovereign'y of the State,* "*belonging to the citizens as mere private property*, but the power "of taxation does not extend to the instruments of the Federal "Government." Vide M'Cullough vs. Maryland, 4 Wheat., 424.

He says: "*Power to tax for State purposes is as much an exclu-* "*sive power in the States as the power to lay and collect taxes to pay* "*the debts and provide for the common defence and general welfare* "*of the United States is an exclusive power in Congress*"

He says: "*Outside of the prohibitions, express and implied, con-* "*tained in the Federal Constitution, the power of the States to tax* "*for the support of their own governments is co-extensive with the* "*subjects within their unrestricted sovereign powers, which shows* "*conclusively that the power to tax may be exercised at the same time* "*and upon the same subjects of private property by the United States* "*and the States without inconsistency or repugnancy.*" Vide Gibbons vs. Ogden, 9 Wheat., 199, Nathan vs. Louisiana, 8 How., 82.

He says: "Possessing as the States do, the power to tax for "the support of their own governments, it follows that they may "enact reasonable regulations to provide for the collection of the "taxes levied for that purpose, not inconsistent with the power of "Congress to regulate commerce nor repugnant to the laws passed "by Congress upon the same subject. *Reasonable regulations for* "*the collection of such taxes may be passed by the States, whether the* "*property taxed belongs to residents or non-residents, and in the ab-* "*sence of any congressional legislation upon the same subject, no doubt* "*is entertained that such regulation, if not in any way discriminat-* "*ing against the citizens of other States, may be upheld as valid.*"

He refers to Woodruff vs. Parham, 8 Wall., 138, Hinson vs. Lott, 8 Ibid, 151, and says: "Taxes, it is conceded in those cases, may "be imposed by a State on all sales made within the State, whether "the goods sold were the produce of the State imposing the tax "or of some other State, provided the tax is uniform. But at the "same time the court decides that a tax discriminating against "the commodities of the citizens of the other States of the Union "would be unconstitutional and invalid.

He says: "That as the statute imposes a tax upon persons not "permanent residents of the State, it is not possible to deny that "the tax is discriminating, and is repugnant to the Federal Con-"stitution, and for this reason is invalid."

Mr. Justice Bradley concurred in the opinion that the statute discriminates in favor of residents and against non-residents of the State, and is in violation of the fourth article of the Constitution of the United States, and therefore *pro tanto* void. And he further said that it was in violation of the commercial clause of the Constitution, and therefore dissented from the opinion of the court, which in any way implies that such a burden, whether in the shape of a tax or a penalty, if made equally upon residents and non-residents, would be constitutional.